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90-1348

No._____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

BRIGNOLI & CURLEY, INC.,
RICHARD BRIGNOLI
and BRIGNOLI MODELS, INC.,

Petitioners,

v.

JOHN J. CURLEY,
JAMES KARANFILIAN, DUANE ROBERTS
and BRIGNOLI, CURLEY & ROBERTS ASSOCIATES,
a limited partnership

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Of Counsel

February 4, 1991

QUESTIONS PRESENTED

1. Whether an action, initially commenced by certain limited partners as a derivative action and remaining as such throughout judgment and appeal, may solely for the purposes of preserving diversity jurisdiction in light of *Carden v. Arkoma Associates*, 110 S.Ct. 1015 (1990), be retroactively converted to a class action even though under the governing state law the limited partnership may sue and be sued as an entity.

2. Whether the Court of Appeals may, to preserve diversity jurisdiction, after judgment, drop a limited partnership as a dispensable party from an action, where the District Court has ordered the dissolution of and has appointed a receiver for the limited partnership.

LIST OF PARTIES

The caption to this Petition lists all the parties to this Petition and to the proceeding before the United States Court of Appeals for the Second Circuit.

RULE 29.1 LISTING

The corporate petitioners, Brignoli & Curley, Inc. and Brignoli Models, Inc. do not have any parents or subsidiaries.

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BRIGNOLI & CURLEY, INC.,
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a limited partnership

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PRELIMINARY STATEMENT

Petitioners Brignoli & Curley, Inc. ("BCI"), Richard Brignoli ("Brignoli") and Brignoli Models, Inc. ("BMI") (collectively "Petitioners") respectfully submits this Petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit (the "Court of Appeals").

OPINIONS BELOW

The opinion of the Court of Appeals (the "Opinion") is reported as *John J. Curley, James Karanfilian and Duane Roberts, individually and on behalf of Brignoli, Curley & Roberts Associates, a Delaware limited partnership v. Brignoli, Curley & Roberts Associates, a limited partnership, Brignoli & Curley, Inc. and Richard Brignoli*, 915 F.2d 81 (2d Cir. 1990) and appears as Appendix A. The Opinion and Decision of the United States District Court for the Southern District of New York dated August 10, 1989 (the "District Court Decision") is not reported and appears as Appendix C.

JURISDICTION

Jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1254(1). The date of the entry of the judgment of the United States Court of Appeals for the Second Circuit is September 20, 1990. The date of the order denying the petition for rehearing is November 6, 1990.

STATUTES AND RULE PROVISIONS INVOLVED

A. Statutes:

N.Y. Partnership Law §115 (McKinney's 1989):

A contributor, unless he is a general partner, is not a proper party to proceedings by or against a partnership, except where the object is to enforce a limited partner's right against or liability to the partnership and except in cases provided for in section one hundred fifteen-a of this article.

B. Rule Provisions:

Fed. R. Civ. P. 17 - Reproduced as Appendix E
Fed. R. Civ. P. 19 - Reproduced as Appendix F
Fed. R. Civ. P. 21 - Reproduced as Appendix G
Fed. R. Civ. P. 23 - Reproduced as Appendix H
Fed. R. Civ. P. 23.2 - Reproduced as Appendix I

STATEMENT OF THE CASE

A. The Parties

Petitioner BCI, itself a Delaware corporation, was the sole general partner of Brignoli Curley & Robert Associates ("BCR"), a Delaware limited partnership with its principal place of business in New York, until August 10, 1989, the date of the District Court Decision. Petitioner Brignoli was from December 14, 1987 until that same date, the Chief Executive Officer of BCI. He also owns 50.1% of BCI as a trustee. Petitioner BMI is a Delaware corporation doing business in New York, of which Brignoli is Chairman and Chief Executive Officer. While Brignoli owns a majority of BMI's stock, the remainder of BMI's stock is owned by such diverse individuals as Professor Harry Markowitz, the 1990 Nobel Laureate for Economics. In addition, BMI is governed by a board of directors which includes individuals other than Brignoli.

BCR is owned by thirteen limited partners. BMI, as the owner of 54% of BCR's interests, is the largest limited partner. Respondents John J. Curley ("Curley") and James Karanfilian ("Karanfilian"), both citizens of New Jersey, and Duane Roberts ("Roberts"), a citizen of Connecticut, collectively own 36% of BCR's equity. The other 10% is owned by the nine limited partners.

BCR, until the date of the District Court Decision, was in the business of managing equity portfolios for large

pension funds and other institutional investors. It did this by licensing a unique and sophisticated stock trading program from BMI, which BMI operated for BCR.

B. The Proceedings Below

Respondents Curley, Karanfilian and Roberts commenced this action in the District Court as a derivative action on behalf of themselves and on behalf of BCR on July 29, 1988. Only BCR, BCI and Brignoli were named as defendants. Subject matter jurisdiction was based upon diversity of citizenship.

In their complaint, Respondents charged BCI and Brignoli with breaches of fiduciary duty. They requested as relief the removal of BCI as general partner, the dissolution of BCR and damages from BCI and Brignoli.

After a bench trial, in June and July 1989, the District Court determined that BCI and Brignoli had committed various breaches of fiduciary duty. In its decision (Appendix C), which was "So Ordered", the District Court removed BCI as general partner of BCR, decreed that a vote be taken by BCR's limited partners except BMI to determine (1) whether BCR be liquidated or another general partner appointed and (2) the identity of the liquidating trustee or new general partner. The District Court enjoined BMI from participating in the vote, even though it was not a party to the action.

After a purported vote of the limited partners other than BMI, the District Court entered an interlocutory

judgment (Appendix D). The District Court ordered that BCR be dissolved and that the law firm of Battle Fowler be appointed as receiver and liquidating trustee of BCR. Immediately after the entry of judgment, Battle Fowler began the liquidation and to date has commenced legal proceedings on behalf of BCR.

C. The Court of Appeals and the Diversity Problem

From the start, in their answer, BCI and Brignoli denied that the District Court had diversity jurisdiction. Although they did not move to dismiss the complaint before trial, during the trial, BCI and Brignoli moved to dismiss the action, asserting that both Brignoli and Karanfilian were citizens of Connecticut. The District Court denied the motion after Respondents dropped Karanfilian as a party.

On appeal to the Court of Appeals, Petitioners, among other things, pressed their attack on the District Court's subject matter jurisdiction. Petitioners' argued in their brief that the District Court could not drop Karanfilian as a party to preserve subject matter jurisdiction once he had evinced a desire to be an active plaintiff. See *Pappas v. Arfaras*, 712 F. Supp. 307 (E.D.N.Y. 1989); *Schmidt v. E.N. Maisel & Associates*, 105 F.R.D. 157 (N.D. Ill. 1985); *Potomac Electric Power Co. v. Babcock & Wilcox Co.*, 54 F.R.D. 486, 492 (D.Md. 1972).

Between the time of the filing of Petitioners' brief and the oral argument of the appeal, the Court decided

Carden v. Arkoma Associates, 110 S.Ct. 1015 (1990), in which the Court held that the diversity citizenship of a limited partnership is determined by the citizenship of all its limited partners. At oral argument, Petitioners argued that *Carden* provided an additional reason for the lack of subject matter jurisdiction. This is because Curley and Roberts were plaintiffs and under *Carden* the citizenship of defendant BCR was also determined by Curley and Robert's citizenship. In essence, Petitioners argued that under the rationale of *Carden* derivative actions based solely upon diversity were not subject to the jurisdiction of the federal courts since the limited partners would be on both sides of the caption. *See Phillips v. Kula 200*, 83 F.R.D. 533 (D. Haw. 1978).

The Court of Appeals agreed with Petitioners' argument in this respect. Opinion at 6545. However, in a desperate effort to save jurisdiction, the Court of Appeals (1) held that Respondents could have brought the action as a class action without satisfying the numerosity requirement; (2) converted, pursuant to 28 U.S.C. §1653, the action from a derivative action to a class action after the entry of judgment and even through the other limited partners had no opportunity to participate in the litigation; (3) held that BCR, the limited partnership, was not an indispensable party to the action even though it was the subject of the dissolution and had had a receiver appointed for its assets; and (4) dropped BCR as a party.

REASONS FOR GRANTING THE PETITION

I

THE COURT SHOULD GRANT CERTIORARI RELATING TO THE PROPER SCOPE OF RULE 23.2 SINCE THERE EXISTS A CONFLICT BETWEEN THE CIRCUITS REGARDING ITS INTERPRETATION.

The Court of Appeals recognized that its decision to convert this action to a class action directly conflicted with the opinion of the Court of Appeals for the First Circuit in *Northbrook Excess & Surplus Ins. Co. v. Medical Malpractice Joint Underwriting Ass'n of Mass.*, 900 F.2d 476, 478-79 (1st Cir. 1990). Opinion at 6550. However, the Court of Appeals sided with the Court of Appeals for the First Circuit in its opinion in *Kerney v. Fort Griffin Fandangle Ass'n, Inc.*, 624 F.2d 717, 719-20 (5th Cir. 1980).

The issue dividing the circuits is whether Rule 23.2, a rule specifically added by the 1966 amendments to the Federal Rules of Civil Procedure to provide for class actions for unincorporated associations, authorizes such actions when the association may sue and be sued as an entity under the law of the governing state. The conflict arises from the Advisory Committee's Note to Rule 23.2:

> Although an action by or against representatives of the membership of an unincorporated association

has often been viewed as a class action, *the real or main purpose of this characterization has been to give "entity treatment" to the association when formal reasons it cannot sue or be sued as a jural person under Rule 17(b).*

Fed. R. Civ. P. 23.2 Advisory Committee's Note (Emphasis added.) Under Rule 17(b) the law of the state in which the district court is held determines. for diversity purposes, whether an association can sue or be sued as an entity.

The *Northbrook* Court held that since Rule 23.2 was adopted to give "entity treatment" to associations who are not considered jural entities, the rule is limited to those associations.[1] The Court of Appeals and the *Kearney* Court, on the other hand, held that Rule 23.2 allowed all associations to sue or be sued as a class. Courts adhering to this view are: *Lefebvre v. Kelley*, No. 83 Civ. 3211 (ERK)(E.D.N.Y. May 21, 1987); *Lumbermen's Underwriting Alliance v. Mobil Oil Corp.*, 612 F.Supp. 1166, 1170 (D. Idaho 1985).

[1] Courts adhering to the *Northbrook* view are: *Suchem, Inc. v. Central Aguirre Sugar Co.*, 52 F.R.D. 348, 355 (D.P.R. 1971); *Peerless Ins. Co. v. Aetna Casualty & Sur. Co.*, 735 F.Supp. 452, 455 (D.N.H. 1990); *Lang v. Windsor Mount Joy Mut. Ins. Co.*, 493 F. Supp. 97 (E.D. Pa. 1980); *National Bank of Washington v. Mallery*, 669 F. Supp. 22, 25 (D.D.C. 1989).

Before the adoption of Rule 23.2, if the state did not authorize suit by or against the association as an entity, the association was able to sue or be sued only if all the association's members were joined as parties or as a class action under Rule 23. However, with respect to joinder, this raised obvious problems relating to personal jurisdiction and venue. Moreover, to use the class device, Rule 23(a)'s strict requirements of numerosity, commonality and typicality had to be satisfied. This made it difficult for an association to commence a suit or for a suit to be commenced against it. *See generally* Note, *Capacity and Class Actions Under Federal Rule 23.2*, 61 B.U.L. Rev. 713 (May 1981); C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure Civil* § 1861 (2d Ed. 1986). Rule 23.2 was designed to make the class action device more available to associations since all the requirements of Rule 23 did not have to be fulfilled.[2] Opinion at 6549; *See* Note, *supra* (arguing that Rule 23.2 should be broadly construed to include all associations but that Rule 23's requirements should apply).

In this action, the Court of Appeals misused Rule 23.2 not only by converting Respondents' action into a class action even though a limited partnership can sue and

[2] As the Court of Appeals recognized, although there is some disagreement on this point, most authorities are of the view that the members of the association need not satisfy the requirements of Rule 23 to obtain class treatment pursuant to Rule 23.2. Opinion at 6549 n.4.

be sued as an entity under New York law, but by applying Rule 23.2 at all. As stated, Rule 23.2 was designed to facilitate class action brought by the association *on its own behalf*. It was not designed to be used by members of the association bringing suit on their own behalf. *David v. Showtime/The Movie Channel, Inc.*, 697 F.Supp. 752 (S.D.N.Y. 1988). Here, BCR, the association, was not suing BCI and Brignoli. Instead, the limited partners, as members of association, were suing BCI, the general partner, and Brignoli based upon the fiduciary duty of BCI to them. These limited partners do not comprise an entity subject to Rule 23.2 treatment. In fact, the limited partners cannot sue as the entity or they will lose their limited liability. N.Y. Partnership Law §115; *Fuhrman v. Pustua*, 126 A.D 629, 111 N.Y.S. 34 (1st Dep't. 1908).

The conflict between the circuits has important ramifications concerning the practical application of the Court's decisions regarding the diversity citizenship of an association. *See e.g. United Steelworkers of America v. R.H. Bouligny, Inc.*, 382 U.S. 145 (1965).

If, as the Court of Appeals has held, Rule 23.2 class treatment is available for all unincorporated associations, the rule will be easily evaded by the association commencing a class action naming only the non-diverse members as parties. While one of the advantages of the class action device is to solve diversity jurisdictional problems, *see Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 365-66 (1921), there is no reason why a limited partnership, which can be sued as an entity, should be

entitled to class treatment without satisfying the requirements of Rule 23.

Petitioners' respectfully submit that this conflict between the circuits, concerning a rule which the Court has yet to construe, should be resolved by the Court and is an appropriate basis for certiorari. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373 (1981).

II

THE COURT SHOULD GRANT THE PETITION TO AMPLIFY THE DEFINITION OF AN INDISPENSABLE PARTY PURSUANT TO RULE 19(B)

The Court of Appeals analyzed the four factors enumerated in Fed. R. Civ. P. 19(b) and explained by the Court in *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968) in determining that BCR was not an indispensable party. However, the Court of Appeals did not give adequate weight to the first factor of Rule 19)b), the effect on the absent party -- a factor which has been considered decisive by other courts in similar contexts. Plaintiffs' submit that the Court should grant the Petition to amplify this factor.

In *Liddy v. Urbanek*, 707 F.2d 1222, 1224 (11th Cir. 1983), the Court of Appeals for the Eleventh Circuit, relying upon *Ross v. Bernhard*, 396 U.S. 531 (1970), held that a shareholder's derivative suit may not be commenced without the joinder of the corporation as an indispensable party, even if the joinder defeats diversity. The court reasoned that in a shareholder's derivative suit the claim is asserted in favor of the corporation and the corporation therefore must be a party. The court cited the *Provident Tradesmens* opinion but did not analyze the question in terms of its factors. To that court, the fact that the right was personal to the corporation was determinative.

Similarly, the District Court in *Bates v. Cekada*, 130 F.R.D. 50 (E.D.Va. 1990) dismissed an action which would have required the Court to direct the duties of directors of a corporation because of the plaintiffs' inability to join the corporation without destroying diversity jurisdiction. While the court considered the *Provident Tradesmens* factors, the court also reasoned, by analogy to derivative actions, that the corporation must be a party to an action relating to its internal affairs.

The similarities between limited partnerships and corporations has been expressed by the Court of Appeals in *Klebanow v. New York Produce Exch.*, 344 F.2d 294, 296-7 (2d Cir. 1965), as follows:

> [I]n the main, a limited partner is more like a shareholder, often expecting a share of the profits, subordinated to general creditors, having some control over direction of the enterprise by his veto on the admission of new partners, able to examine the books and "have on demand true and full information of all things effecting the partnership ..." See N.Y. Partnership Law Sections 98, 99, 112. That the limited partner is immune to personal liability for partnership debts save for his original investment, is not thought to be an "owner" of partnership property and does not manage the business may distinguish him from general partners and strengthens his resemblance to the

> stockholder; and even after his profits and dissolution, he resembles the preferred stockholder.

344 F.2d at 297.

Indeed, the New York Court of Appeals compared limited partners to corporate shareholders in deciding that limited partners may assert a derivative cause of action. *Lichtyger v. Franchard Corporation*, 18 N.Y.2d 528, 277 N.Y.S.2d 377 (1966). Moreover, pursuant to New York Partnership Law Section 115, a limited partner is not a proper party to a proceeding by a partnership except in a derivative action. This means that the partnership itself must, for the most part, sue as an entity.

The court in *Smith v. Bader*, 458 F. Supp. 1184, 1187 (S.D.N.Y. 1978) analogized limited partnerships to corporations in holding that a limited partnership is a necessary party to a derivative action. The court went on to say that where the relief sought would have a direct effect on the partnership and its assets, i.e., the appointment of receiver, the partnership should be joined as a party since the limited partners are not primarily concerned with the interests of the partnership. While *Smith v. Bader* did not decide whether a limited partnership is an indispensable party, the court in *Camden Securities Co. v. Lupowitz*, 500 F. Supp. 653 (E.D. Pa. 1980), using similar reasoning, did:

> [A] judgment entered in the name of the plaintiffs and not the partnership would fail to take into account the question of the partners' contribution to capital, the receipts and expenditures of the partnership, the sums drawn from partnerships funds by the plaintiffs and defendant, and such other matters as may enter into the determination of the amount, if any, due from the defendant partner to the plaintiff partners. The first factor listed in Rule 17(b) therefore favors dismissal of the action.

500 F.Supp. at 655; *See also Pappas v. Arfaras*, 712 F. Supp. at 310.

In this action, the District Court ordered the dissolution of BCR, which was found by the Court of Appeals to be a party destroying jurisdiction, and appointed a receiver for BCR. BMI, the majority limited partner of BCR, was not only not a party to the action, but was enjoined from voting on whether or not to dissolve. The receiver is commencing actions on behalf of BCR. Petitioners submit that BCR was an indispensable party to the action. Indeed, the judgment entered by the District Court was in favor of BCR. Without BCR as a party the receiver is in effect representing limited partners directly, a role which limited partners cannot have without subjecting themselves to liability as actors in the limited partnership. See N.Y. Partnership Law Section 115;

Fuhrman v. Pustua, 126 A.D at 629, 111 N.Y.S. at 34 (1st Dep't. 1908).

Petitioners' submit that the cases relied upon by the Court of Appeals in the Opinion at 6560-61 are distinguishable either because they involve a general partnership which does not have any existence apart from its partners or do not deal with dissolutions or receiverships. *See VMS/PCA Ltd. Partnership v. PCA Partners Ltd. Partnership*, 727 F. Supp. 1167, 1169-71 (N.D. Ill. 1989); *Whitney v. Citibank, N.A.*, No. 81 Civ. 5832 (CBM) (S.D.N.Y. April 19, 1985); *Godine & Stundee, Inc. v. Reading Station Assocs. Ltd. Partnership*, No. Civ 89-0514 (E.D.Pa. May 4, 1989).

CONCLUSION

Petitioners respectfully request that the Court grant the Petition.

Respectfully submitted,

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Steven G. Storch, Esq.
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Of Counsel

February 4, 1991

APPENDICES

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1129, 1130—August Term, 1989

(Argued: April 12, 1990 Decided: September 20, 1990)

Docket Nos. 89-7979, 89-9247

JOHN J. CURLEY, JAMES KARANFILIAN and DUANE ROBERTS, individually and on behalf of BRIGNOLI, CURLEY & ROBERTS ASSOCIATES, a Delaware limited partnership,

Plaintiffs-Appellees,

—v.—

BRIGNOLI, CURLEY & ROBERTS ASSOCIATES, a limited partnership; BRIGNOLI & CURLEY, INC., and RICHARD BRIGNOLI,

Defendants,

BRIGNOLI & CURLEY, INC., and RICHARD BRIGNOLI,

Defendants-Appellants,

BRIGNOLI MODELS, INC.,

Appellant.

Before:

LUMBARD, FRIEDMAN,* and MAHONEY,
Circuit Judges.

Appeals from judgments entered after a nonjury trial in the United States District Court for the Southern District of New York, Milton Pollack, *Judge*. Finding breaches of fiduciary duty, the district court ordered dissolution of a limited partnership pursuant to removal of its corporate general partner, and awarded damages against the principal of that general partner.

Appellants contend that diversity jurisdiction has been destroyed by the intervening decision of the Supreme Court in *Carden v. Arkoma Associates*, 110 S. Ct. 1015 (1990). We conclude, however, that *Carden* does not preclude diversity jurisdiction on the facts presented herein. We therefore affirm and remand.

RAYMOND J. SOFFIENTINI, New York New York (Battle Fowler, New York, New York, of counsel), *for Plaintiff-Appellee Brignoli, Curley & Roberts Associates.*

STEVEN G. STORCH, New York, New York (Munves, Tanenhaus & Storch, P.C.,

* Daniel M. Friedman, United States Circuit Judge for the Federal Circuit, sitting by designation.

New York, New York, of counsel), *for Defendants-Appellants*.

Fulbright Jaworski & Reavis McGrath, New York, New York (Glen Banks, Linda K. Singer, New York, New York, of counsel), *for Plaintiffs-Appellees John J. Curley and James Karanfilian*.

MAHONEY, *Circuit Judge*:

This appeal is taken from a judgment of the United States District Court for the Southern District of New York, Milton Pollack, *Judge*, ordering dissolution of a limited partnership, the removal of its general partner, and awarding damages occasioned by the misappropriation of an asset of the partnership.

During the pendency of this appeal, the Supreme Court determined, in *Carden v. Arkoma Associates*, 110 S. Ct. 1015 (1990), that in a federal action to which a limited partnership is a party, the citizenship of limited partners must be taken into account to determine whether there is diversity of citizenship among the parties. We recharacterize plaintiff's lawsuit as a class, rather than a derivative, action, and dismiss the limited partnership as a party defendant on the authority of *Newman-Green, Inc. v. Alfonzo-Larrain*, 109 S. Ct. 2218 (1989), and Fed. R. Civ. P. 21. We then confirm the existence of subject matter jurisdiction, affirm on the merits for the reasons stated in the opinion of the district court, and remand.

Background

A. *The Parties.*

Brignoli, Curley & Roberts Associates ("BCR") is a Delaware limited partnership with its principal place of business in New York. The sole general partner of BCR is defendant Brignoli & Curley, Inc. ("BCI"), a Delaware corporation whose principal place of business is also in New York. On December 14, 1987, defendant Richard Brignoli ("Brignoli") became chief executive officer of BCI and assumed control of the day-to-day business operations of BCR. Brignoli's citizenship was disputed below; plaintiffs claim that he is a citizen of New York, while defendants attribute Connecticut citizenship to him.[1] Brignoli, as trustee, owns 50.1% of BCI's stock, and the remainder is owned by plaintiff John J. Curley ("Curley").

The limited partners of BCR include Curley and plaintiff James Karanfilian ("Karanfilian"), both citizens of New Jersey, former plaintiff Duane Roberts ("Roberts"),[2] a citizen of Connecticut, and Brignoli Models, Inc. ("BMI"), a Delaware corporation of which Brignoli is the chairman and chief executive officer. Brignoli owns a majority of BMI's stock. Curley, Karanfilian, and Roberts collectively own approximately thirty-six percent of the equity of BCR, and BMI owns approximately fifty-four percent. The balance of the

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1 This issue subsequently became irrelevant in the district court, *see infra* note 2, and is also irrelevant to our disposition of this appeal.

2 Roberts, originally a named plaintiff, was dismissed as a party on plaintiffs' motion, pursuant to Fed. R. Civ. P. 21, in order to prevent a challenge to diversity jurisdiction based upon Roberts' Connecticut citizenship. We consider extensively hereinafter the propriety of dismissal of parties in this case pursuant to rule 21.

equity of BCR is owned by other limited partners of BCR.

B. *The Proceedings Below.*

Curley, Karanfilian, and Roberts commenced this action on July 29, 1988, invoking diversity of citizenship as the basis of federal subject matter jurisdiction. They alleged various breaches of fiduciary duty by BCI as the general partner of BCR and by Brignoli as the person in control of BCI, and sought: (1) removal of BCI as general partner of BCR or, in the alternative, the dissolution of BCR; (2) judgment against Brignoli and BCI in favor of BCR for damages in compensation for breaches of fiduciary duty by Brignoli and BCI; and (3) an accounting as to BCR. BCR, BCI, and Brignoli were named as defendants.

Following a bench trial, the district court found that BCI and Brignoli had indeed engaged in improper self-dealing. Among the findings were that BCI and Brignoli wrongfully refused plaintiffs access to BCR's books and records, and that Brignoli misappropriated a $175,000 certificate of deposit from BCR, pledging it to secure a loan to BMI. Pursuant to its opinion dated August 4, 1989, and judgments entered thereon, the district court granted, *inter alia*, the following relief: 1) removal of BCI as general partner of BCR; 2) prohibition of BMI from voting its interest in BCR in a subsequent vote by the limited partners (pursuant to the partnership agreement) on whether to replace BCI with a new general partner or to dissolve BCR; 3) after a vote in favor of dissolution, entry of judgment ordering dissolution of BCR under the direction of the law firm Battle Fowler as receiver and liquidating trustee; and (4) entry of judg-

ment against Brignoli and in favor of BCR for the damages occasioned by Brignoli's misappropriation of BCR's certificate of deposit.

This appeal followed.[3]

Discussion

A. *The Diversity Problem.*

The merits of this appeal need not detain us. The district court's thorough opinion convincingly resolves the questions of fiduciary duty and self-dealing tendered by the parties, and there is no need for an appellate rehash of those fact-specific issues.

A significant question of subject matter jurisdiction (indeed, the only question addressed in the oral argument of this appeal), however, is posed by a decision of the Supreme Court, *Carden v. Arkoma Associates*, 110 S. Ct. 1015 (1990), which was rendered on February 27, 1990, during the pendency of this appeal. *Carden* answered in the affirmative "[t]he question . . . whether, in a suit brought by a limited partnership, the citizenship of the limited partners must be taken into account to determine diversity of citizenship among the parties." 110 S. Ct. at 1016. The opinion subsequently specified that "diversity jurisdiction in a suit *by or against* [a limited partnership] depends on the citizenship of 'all the members' . . . ." *Id.* at 1021 (emphasis

3 In a related case, this court affirmed a summary judgment of the United States District Court for the Southern District of New York that awarded $150,000 plus interest to Curley against BMI, based upon a loan agreement which required BMI to repay $150,000 to Curley on or before June 30, 1989 "out of . . . the profits paid" to BMI by BCR. *See Curley v. Brignoli Models, Incorporated*, No. 90-7033 (2d Cir. May 7, 1990).

added) (quoting *Chapman v. Burney*, 129 U.S. 677, 682 (1889)).

Since we must decide this appeal on the basis of the law existing at the time of our decision, *see Griffith v. Kentucky*, 479 U.S. 314, 322 (1987); *Hegger v. Green*, 646 F.2d 22, 26 (2d Cir. 1981), and since subject matter jurisdiction is an unwaivable *sine qua non* for the exercise of federal judicial power, *see Carden*, 110 S. Ct. at 1021 (quoting *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900) (quoting *Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884))); *Colonial Realty Corp. v. Bache & Co.*, 358 F.2d 178, 183 (2d Cir.), *cert. denied*, 385 U.S. 817 (1966); Fed. R. Civ. P. 12(h), we must give careful attention to the jurisdictional question posed by *Carden*.

That question arises against the background of the complete-diversity rule first articulated in *Strawbridge v. Curtis*, 7 U.S. (3 Cranch) 267 (1806), which establishes that in order to invoke diversity jurisdiction under 28 U.S.C. § 1332 (1988), the plaintiffs must show that none of them shares citizenship with any defendant. Until *Carden*, the long-standing rule in this circuit was that, in proceedings where a limited partnership was a party but its limited partners could not properly be joined under state law, only the citizenship of general partners was considered for diversity purposes.

This rule was stated in *Colonial* as follows:

> [T]he citizenship of a limited partnership was not sufficiently made out for diversity purposes by alleging the state of its organization, even though state law permitted the partnership to sue or be sued in the firm name. But . . . where, as here,

> there was diversity between the plaintiff and all the general partners of the defendant, identity of citizenship between the plaintiff and a limited partner was not fatal because under the applicable New York statute a limited partner "is not a proper party to proceedings by or against a partnership, except where the object is to enforce a limited partner's right against or liability to the partnership." N.Y. Partnership Law § 115. In the absence of a claim of insolvency of the partnership, a suit brought against a New York partnership must thus be considered to be against the general partners only and identity of citizenship between a limited partner and the plaintiff does not destoy [sic] diversity.

358 F.2d at 183-84 (case citations and footnote omitted).

Admittedly, there existed some doubt as to whether the *Colonial* rule governed derivative suits brought by limited partners against their limited partnership. *Compare Pappas v. Arfaras*, 712 F. Supp. 307, 309-11 (E.D.N.Y. 1989) (considering limited partners' citizenship and thus destroying diversity), *with Tucker Anthony Realty Corp. v. Schlesinger*, No. CV-88-0868, slip op. at 6-8 (E.D.N.Y. June 16, 1989) (disregarding diversity-destroying citizenship of limited partners). Nevertheless, it was at least a plausible reading of *Colonial* that the citizenship of limited partners was not attributable to the partnership even when the partnership was named as a party to a derivative suit.

Curley and Karanfilian, citizens of New Jersey, shared citizenship with neither BCI (the sole general partner of BCR), of Delaware and New York, nor Brignoli, of either New York or Connecticut. BCR was also named

as a defendant, but so long as BCR could be deemed to have the citizenship of its general partner only, diversity would exist. If, on the other hand, the citizenship of BCR's limited partners were attributable to BCR as well, diversity would be lacking, because the New Jersey citizenship of Curley and Karanfilian would then be present on both sides of the case. *See, e.g., Phillips v. Kula 200*, 83 F.R.D. 533 (D. Haw. 1978) (no diversity jurisdiction where limited partners sued partnership; citizenship of plaintiff partners attributed to partnership, destroying diversity).

In a prejudgment attack on the district court's assertion of diversity jurisdiction, defendants never sought to attribute the limited partners' New Jersey citizenship to defendant BCR. *See supra* note 1. At the oral argument of this appeal, however, defendants invoked *Carden*, correctly contending that *Carden* destroys plaintiffs' diversity scenario because plaintiffs' New Jersey citizenship is also attributed to defendant BCR.

The invalidity of plaintiffs' theory of diversity, however, does not end our inquiry. This court must liberally construe plaintiffs' complaint "to determine whether the facts set forth justify taking jurisdiction on grounds other than those most artistically pleaded." *New York State Waterways Ass'n v. Diamond*, 469 F.2d 419, 421 (2d Cir. 1972). Further, there is a developing consensus that a circuit court may look to unpleaded bases of federal subject matter jurisdiction. *See Gerritsen v. de la Madrid Hurtado*, 819 F.2d 1511, 1515 (9th Cir. 1987) ("we are not limited to the jurisdictional statutes identified in the complaint"); *Hahn v. United States*, 757 F.2d 581, 587 (3rd Cir. 1985) (same); *see also* 5 C. Wright & A. Miller, Federal Practice and Procedure

§ 1206, at 91 (2d ed. 1990) ("the court may sustain jurisdiction when an examination of the entire complaint reveals a proper basis for assuming jurisdiction other than one that has been improperly asserted"); *cf.* 28 U.S.C. § 1653 (1988) ("Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts."). Regarding the particular problem presented here, we have espoused "the proposition that a jurisdictionally defective complaint can be regarded as satisfactorily amended if the record as a whole establishes the existence of the required diversity of citizenship between the parties." *Baer v. United Servs. Auto. Ass'n*, 503 F.2d 393, 397 (2d Cir. 1974).

Recognizing our "obligation to explore any promising avenue to the District Court's jurisdiction, whether or not it is suggested by the parties," *Association of Am. Medical Colleges v. Califano*, 569 F.2d 101, 111 (D.C. Cir. 1977), we first inquire whether plaintiffs could have brought a class, rather than derivative, action against BCI and Brignoli, pursuant to Fed. R. Civ. P. 23.2. Second, we examine our authority to recharacterize the derivative claim as a class claim, a question largely governed by 28 U.S.C. § 1653 (1988). Finally, we consider whether, in the event of such recharacterization, BCR may be considered a dispensable party pursuant to Fed. R. Civ. P. 19 and accordingly may be dropped as a party at this juncture in the litigation, thus establishing diversity of citizenship and sustaining subject matter jurisdiction. Deciding all three issues in plaintiffs' favor, we confirm the existence of subject matter jurisdiction, affirm on the merits, and remand.

B. *The Availability of a Class Action.*

As previously discussed, BCR's diversity-breaking role as a party to this action is occasioned by the derivative nature of the action brought by the limited partner plaintiffs. Curley and Karanfilian could have avoided joining BCR by bringing their claim as plaintiffs suing on behalf of a class of limited partners of BCR. Fed. R. Civ. P. 23.2 provides in pertinent part:

> An action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties may be maintained only if it appears that the representative parties will fairly and adequately protect the interests of the association and its members.

The language of rule 23.2 specifies only one prerequisite to class treatment, fair and adequate representation. The gravamen of the complaint in this case, amply supported by the trial record, is that the general partner, BCI, and its controlling shareholder, Brignoli, looted BCR for Brignoli's benefit. All of the limited partners have an identical interest, as does BCR, in terminating that course of conduct and obtaining recompense from BCI and Brignoli for the harm done by them to BCR. Curley, Karanfilian and Roberts (until his dismissal as a plaintiff) not only were capable of fairly and adequately representing that interest; they in fact did so.

BMI is the only limited partner that could arguably disclaim their representation. BMI, however, a corporation of which Brignoli was the principal, was part and parcel of the scheme to plunder BCR for Brignoli's benefit. It would be ludicrous to read rule 23.2 to disqualify the plaintiffs here as proper representatives of the BCR

limited partners because they do not fairly represent a limited partner participating in a scheme for the spoilation of BCR at the expense of the class (excluding BMI) of limited partners.

This issue was addressed in *Lefebvre v. Kelly*, No. 83 CV 3211 (ERK) (E.D.N.Y. May 21, 1987), in the following terms:

> Defendants also contend that a class action cannot be certified in this case because the interests of the designated class representatives are antagonistic to those of the individual defendants who claim to continue to be members of the Society. While it is obvious that such antagonism exists by virtue of the fact that the individual defendants have been sued by the plaintiff class, this will not defeat the class action procedure on the facts of this case.
>
> The purpose underlying the requirement that class representatives fairly and adequately represent the interests of those not appearing is to afford the protection to absent parties which due process requires. Hansberry v. Lee, 311 U.S. 32 (1940). There can be no question in this case but that the interests of the individual defendants are adequately protected. In addition to being named in an individual capacity, the individual defendants serve as directors of the various corporate defendants in this case. When the interests of antagonistic class members are adequately represented by the class' opponents, the requirements of due process are satisfied such that a class can be certified. Horton v. Goose Creek Independent School District, 677 F.2d 471 (5th Cir. 1982); Dierks v. Thompson, 414 F.2d 453 (1st Cir.

1969); Stolz v. United Brotherhood of Carpenters and Joiners, 620 F. Supp. 396 (D. Nev. 1985).

Id., slip op. at 8-9.

We consider the prerequisites to class certification contained in Fed R. Civ. P. 23(a), such as the requirement that the class be "so numerous that joinder of all members is impracticable," to be inapplicable to a rule 23.2 class action. While there is some disagreement on this point,[4] the more persuasive reasoning supports this interpretation. Rule 23.2 expressly refers to subdivisions (d) and (e) of rule 23 when incorporating the provisions of rule 23 with respect to orders regarding the conduct of class actions, subdivision (d), and dismissal or compromise, subdivision (e). It would therefore seem that if the drafters sought to incorporate the requirements of subdivision (a) of rule 23, as well, they would have done so expressly. Indeed, the advisory committee note specifies that rule 23.2 deals "separately" with actions under its purview, "referring *where appropriate* to Rule 23." Fed. R. Civ. P. 23.2 advisory committee's note (emphasis added).

We are aware that some courts have adopted the view that a class action under rule 23.2 may be brought only if the state in which the district court sits has denied the

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4 *Compare Management Television Systs. v. National Football League*, 52 F.R.D. 162, 164 (E.D. Pa. 1971) (rejecting applicability of numerosity requirement of rule 23(a) to rule 23.2 class action) *and* 7C C. Wright, A. Miller & M. Kane, Federal Practice & Procedure § 1861, at 221-22 (2d ed. 1986) (no reason to read rule 23(a) requirements, other than fair and adequate representation, into rule 23.2) *with Suchem, Inc. v. Central Aguirre Sugar Co.*, 52 F.R.D. 348, 355 (D.P.R. 1971) (apparent that "the same prerequisites contained in Rule 23 for a class action are also required for actions under Rule 23.2").

association the requisite capacity to be a party to the suit. *See, e.g., Northbrook Excess & Surplus Ins. Co. v. Medical Malpractice Joint Underwriting Ass'n of Mass.*, 900 F.2d 476, 478-79 (1st Cir. 1990) (rule 23.2 does not authorize suit against members as a class where state law allows association to be sued as an entity); *Suchem, Inc. v. Central Aguirre Sugar Co.*, 52 F.R.D. 348, 355 (D.P.R. 1971) (same); *see also Patrician Towers Owners, Inc. v. Fairchild*, 513 F.2d 216, 220-21 (4th Cir. 1975) (noting *Suchem*'s restrictive interpretation of 23.2 but not reaching the issue); *Peerless Ins. Co. v. Aetna Casualty & Sur. Co.*, 735 F. Supp. 452, 455 (D. N.M. 1990) (following *Northbrook* as governing circuit precedent). This interpretation stems from the following advisory committee comment:

> Although an action by or against representatives of the membership of an unincorporated association has often been viewed as a class action, the real or main purpose of this characterization has been to give "entity treatment" to the association when for formal reasons it cannot sue or be sued as a jural person under Rule 17(b).

Fed. R. Civ. P. 23.2 advisory committee's note.

Rule 17(b) provides in relevant part:

> [C]apacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right under the Constitution or laws of the United States . . . .

Fed. R. Civ. P. 17(b). *Northbrook* reads the committee note as an instruction that the *sole* purpose of rule 23.2 is to provide capacity where none exists under state law. Under this reasoning, rule 23.2 is unavailable to limited partners in a federal district court sitting in New York because the partnership has capacity as an entity under state law. *See* N.Y. Civ. Prac. L. & R. 1025 (McKinney 1976).

We disagree with this restrictive interpretation. It must be remembered that the class action mechanism provides litigants with important procedural advantages. For example, class status may expand the number of districts where venue is proper, *see Appleton Elec. Co. v. Advance-United Expressways*, 494 F.2d 126, 139-40 (7th Cir. 1974); may permit a party to litigate the rights of class members not within the court's personal jurisdiction, *see Calagaz v. Calhoon*, 309 F.2d 248, 253-54 (5th Cir. 1962); or may allow a plaintiff to name as representatives only those association members whose citizenship will not disturb diversity jurisdiction, *see Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 365-66 (1921). If the drafters of rule 23.2 intended to provide only a vehicle for capacity, it seems that they would have simply extended to the diversity realm rule 17(b)'s grant of association capacity in federal question cases.

Further, even if the drafters felt compelled to grant capacity in an indirect manner, perhaps to avoid *Erie* problems in circumventing state capacity limitations, a restrictive interpretation of rule 23.2 does not follow. The more reasonable interpretation is that the drafters, having found it necessary to grant advantageous proce-

dures in states which restrict association capacity,[5] would make those procedures available in all district courts. If they intended the anomaly that the availability of class actions would turn on state capacity laws, the drafters could have so provided in the text of rule 23.2. Accordingly, we agree with those courts that have refused to impose such an interpretation upon the advisory committee note. *See, e.g., Kerney v. Fort Griffin Fandangle Ass'n, Inc.*, 624 F.2d 717, 719-20 (5th Cir. 1980); *Lefebvre v. Kelley*, No. 83 CV 3211 (ERK), slip op. at 6-7 (E.D.N.Y. May 21, 1987); *Lumberman's Underwriting Alliance v. Mobil Oil Corp.*, 612 F. Supp. 1166, 1170 (D. Idaho 1985); *see also* 7C C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1861, at 223 (2d ed. 1986) (reading advisory committee note to support "the view that Rule 23.2 is a procedural device that provides a supplementary method for unincorporated associations to litigate in a federal court") (citing *Lumberman's Underwriting Alliance*).

We conclude that plaintiffs could have brought a rule 23.2 class action, rather than a derivative suit, and next examine our authority thus to recharacterize plaintiffs' action at this stage in the proceedings.

C. *Recharacterization of the Derivative Action as a Class Action.*

There is no diminution in plaintiffs' substantive rights against defendants if their claim is characterized as seeking class, rather than derivative, relief. Fed. R. Civ. P.

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5 We note in this regard that while New York allows an association or partnership to sue in its own right, *see* N.Y. Civ. Prac. L. & R. 1025 (McKinney 1976), it also allows limited partners to bring a class action pursuant to *id.* 1005(a), *see Lichtyger v. Franchard Corp.*, 18 N.Y.2d 528, 534, 223 N.E.2d 869, 872, 277 N.Y.S.2d 377, 381-82 (1966).

17(b) provides that in the case of an individual acting in a representative capacity, "capacity to sue or be sued shall be determined by the law of the state in which the district court is held," in this case New York. Under New York law, the question whether a suit should be brought as a class action or derivatively turns on the relief sought. *Lichtyger v. Franchard Corp.*, 18 N.Y.2d 528, 534-37, 223 N.E.2d 869, 872-74, 277 N.Y.S.2d 377, 381-84 (1966), held that a class action on behalf of all limited partners properly may redress breaches of fiduciary duty by general partners, while *Riviera Congress Assocs. v. Yassky*, 18 N.Y.2d 540, 546, 223 N.E.2d 876, 879, 277 N.Y.S.2d 386, 391 (1966), held that suit was "properly" brought derivatively, rather than on behalf of all limited partners as a class, where the partnership had refused to enforce its claim against a third party. As this distinction has survived New York's codification of a limited partners' right to sue derivatively, *see* N.Y. Partnership Law § 115-a (McKinney 1988) (added by 1968 N.Y. Laws ch. 496, § 3); *Alpert v. Haimes*, 64 Misc. 2d 608, 609-10, 315 N.Y.S.2d 332, 334-36 (Sup. Ct. 1970); *see also Westchester Religious Inst. v. Condren*, 123 A.D.2d 352, 355, 506 N.Y.S.2d 364, 366 (2d Dep't 1986), it seems that plaintiffs arguably ought to have brought a class action wholly aside from considerations as to diversity jurisdiction.

The question, then, is whether we can recharacterize their claim at this late date. Under 28 U.S.C. § 1653 (1988), "[d]efective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." "[U]sually the section is to be construed liberally to permit the action to be maintained if it is at all possible to determine from the record that jurisdiction does in fact exist." *John Birch Society v. National Broadcasting*

Co., 377 F.2d 194, 198-99 (2d Cir. 1967). Since the only question of any consequence presented by the class/derivative dichotomy in this case is the jurisdictional issue, we conclude that section 1653 authorizes us to effect the requisite amendment.

As the Seventh Circuit recently said:

> When, as here, the merits have already been decided and factual questions do not need to be resolved regarding prejudice to the correctly named defendant, it would be a meaningless gesture to remand so that the plaintiff could amend its pleading under Rule 15 of the Federal Rules of Civil Procedure. Instead the sensible course is for this Court to permit amendment under 28 U.S.C. § 1653.

International Bhd. of Boilermakers v. Local Lodge D354, 897 F.2d 1400, 1402 (7th Cir. 1990).

The district court tried the issue of the defendants' wrongful acts, concluding that defendants had engaged in massive breaches of their fiduciary duty to BCR. Defendants are not prejudiced by the proposed amendment, because no substantive or procedural disadvantage attaches to defending against the class of BCR's limited partners as opposed to defending a derivative suit. Accordingly, we recharacterize plaintiffs' derivative action as one seeking class relief. We thus reach the final issue: whether, following that recharacterization, BCR may be dismissed as a party at this juncture.

D. *Dismissal of BCR as a Party.*

Recently, the Supreme Court ratified the predominant view that circuit courts have the power, even after judgment has been rendered below, to dismiss a dispensable

party whose presence prevents statutory diversity jurisdiction.[6] *See Newman-Green, Inc. v. Alfonzo-Larrain*, 109 S. Ct. 2218, 2220 (1989). This authority is founded not upon 28 U.S.C. § 1653 (1988), which allows only the correction of faulty *allegations* of jurisdiction, *see* 109 S. Ct. at 2222-23, but rather upon Fed. R. Civ. P. 21, which states in pertinent part: "Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party *or on its own initiative at any stage of the action and on such terms as are just*." *Id.* (emphasis added).

The Court warned that this "authority should be exercised sparingly," and that "the appellate court should carefully consider whether the dismissal of a nondiverse party will prejudice any of the parties in the litigation." 109 S. Ct. at 2226. We have previously noted the absence of prejudice resulting from the dismissal of BCR. On the contrary, dismissal is particularly appropriate in this case, because it spares plaintiffs the prejudice otherwise occasioned by an unforeseeable change in the law invalidating a long-standing jurisdictional precedent of this court, without impacting in any unfairly adverse manner upon defendants.

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6 In the absence of BCR, the remaining plaintiffs and defendants would be diverse. Given the recharacterization of the action as a class action, Curley and Karanfilian would then represent the class of limited partners (other than BMI), and the citizenship of the other limited partners therefore would not be taken into account for diversity purposes. *See Snyder v. Harris*, 394 U.S. 332, 340 (1969); *In re "Agent Orange" Prod. Liab. Litigation MDL No. 381*, 818 F.2d 145, 162 (2d Cir. 1987), *cert. denied* 484 U.S. 1004 (1988); 13B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3606, at 424 (2d ed. 1984).

The question whether a party may be dismissed from an action is essentially governed by Fed. R. Civ. P. 19,[7] which was authoritatively construed by the Supreme Court in *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968). In that case, the Third

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7 Fed. R. Civ. P. 19 provides:

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of Class Actions. This rule is subject to the provisions of Rule 23.

Circuit had dismissed a diversity action arising from an automobile accident for want of subject matter jurisdiction on the basis that the owner of the automobile, not named as a defendant in the case, was an indispensable party within the meaning of rule 19(b), thus destroying diversity. *Provident Tradesmens Bank & Trust Co. v. Lumbermens Mut. Casualty Co.*, 365 F.2d 802 (3d Cir. 1966) (in banc), *rev'd sub nom. Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968).

The Supreme Court reversed. The Court noted that "[t]he optimum solution, an adjudication . . . that would be binding on all interested persons, was not 'feasible' [*see* the captions of subdivisions (a) and (b) of rule 19], for [the owner of the vehicle] could not be made a defendant without destroying diversity." 390 U.S. at 108. The Court then framed and decided the resulting issue as follows:

> Hence the problem was the one to which Rule 19(b) appears to address itself: in the absence of a person who "should be joined if feasible," should the court dismiss the action or proceed without him? Since this problem emerged for the first time in the Court of Appeals, there were also two subsidiary questions. First, what was the effect, if any, of the failure of the defendants to raise the matter in the District Court? Second, what was the importance, if any, of the fact that a judgment, binding on the parties although not binding on [the absent defendant], had already been reached after extensive litigation? The three questions prove, on examination, to be interwoven.
>
> We conclude, upon consideration of the record and applying the "equity and good conscience" test

> of Rule 19(b), that the Court of Appeals erred in not allowing the judgment to stand.

Id. at 108-09.

The Court went on to emphasize that at the appellate stage of a litigation, successful plaintiffs' "interest in preserving a fully litigated judgment should be overborne only by rather greater opposing considerations than would be required at an earlier stage when the plaintiffs' only concern was for a federal rather than a state forum," *id.* at 112; to specify that "[w]hether a person is 'indispensable,' that is, whether a particular lawsuit must be dismissed in the absence of that person, can only be determined in the context of a particular litigation," *id.* at 118; and to express its approval of circuit court cases that "demonstrate close attention to the significant pragmatic considerations involved in the particular circumstances, leading to a resolution consistent with practical and creative justice," *id.* at 119 n.16.

Citing *Provident Tradesmens*, we recently stated:

> As an alternative to dismissal, a court should take a flexible approach when deciding what parties need to be present for a just resolution of the suit. *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 88 S.Ct. 733, 19 L.Ed.2d 936 (1968). The phrase "good conscience" implies a careful and constructive consideration of those parties that are necessary to the litigation. As a consequence, very few cases should be terminated due to the absence of nondiverse parties unless there has been a reasoned determination that their nonjoinder makes just resolution of the action impossible.

Jaser v. New York Property Ins. Underwriting Ass'n, 815 F.2d 240, 242 (2d Cir. 1987); *see also Prescription Plan Serv. Corp. v. Franco*, 552 F.2d 493, 496-98 (2d Cir. 1977); 7 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1610, at 147-48 (2d ed. 1986).

Here, as in *Provident Tradesmens*, BCR is a party which, within the meaning of rule 19(a), should be joined "if feasible," but whose joinder would destroy diversity. We must therefore apply the teaching of *Provident Tradesmens* and the criteria of rule 19(b) to the facts presented here to determine whether BCR should be dismissed as a party to preserve diversity of citizenship. Accordingly, we briefly review the four factors which rule 19(b) requires "to be considered," in the order stated in the rule: (1) a judgment rendered in BCR's absence will not be prejudicial to BCR or to any of its limited or general partners; (2) the district court can, by shaping the future relief in this action, address and alleviate any anomalies or inconsistencies that would otherwise result from the absence of BCR as a party, especially since all the limited partners (through the class representatives)[8] and the general partner of BCR will be before the district court; (3) again because of the presence of the limited and general partners of BCR, a judgment rendered in its absence will be adequate; and (4) plaintiffs will not have an adequate remedy if their action is dismissed for nonjoinder, since they would then have to commence a new action in state court, foregoing the relief to which they are justly enti-

8 As indicated earlier herein, the class representatives do not represent BMI, which is not otherwise a party to this litigation, but BMI's principal, Brignoli, is a named defendant. BMI joined the notice of appeal filed by BCI and Brignoli herein as "an aggrieved party," and is accordingly listed in the caption of this appeal as an appellant.

tled after the proceedings herein in the district court, and risking further transgressions by Brignoli and BCI during the course of the new litigation.

We recognize that in *Sixth Geostatic Energy Drilling Program 1980 v. Ancor Exploration Co.*, 544 F. Supp. 297, 298-99 (N.D. Okla. 1982), the court ruled that limited partnerships should be added as parties defendant in an action that sought to put them into receivership, even though their general partners were already parties to the lawsuit. The court ruled, however, that the addition of the limited partnerships did not spoil diversity, *id.* at 299-305, and reserved the question whether, if their addition would preclude diversity, they would then be dropped as parties in reliance upon rule 19(b), *id.* at 299 n.1. In both *DM II, Ltd. v. Hospital Corp. of America*, 130 F.R.D. 469 (N.D. Ga. 1989), and *Camden Securities. Co. v. Lupowitz*, 500 F. Supp. 653 (E.D. Pa. 1980), on the other hand, the court dismissed an action between the members of a partnership where the partnership had not been joined as a party, resolving a rule 19(b) analysis adversely to diversity jurisdiction.

It is noteworthy, however, that in both *DM II* and *Camden Securities*, the cases were in a pretrial posture, and the same controversies were the subject of ongoing, parallel state court litigation. In *DM II*, moreover, the court emphasized its inability to "fashion complete relief in the absence of all partners," 130 F.R.D. at 475, noting that "[j]oinder of each non-party partner would ordinarily satisfy Rule 19, since the interests of the partnership would be adequately represented," *id.* at 473 n.5.

VMS/PCA Ltd. Partnership v. PCA Partners Ltd. Partnership, 727 F. Supp. 1167, 1169-71 (N.D. Ill.

1989), explicitly disagreed with *Camden Securities*, ruling that although the case was in its initial stages, a rule 19(b) analysis required the conclusion that a joint venture was not an indispensable party since "both joint venturers were present before the court, and . . . complete relief could be fashioned in the absence of the Joint Venture." *Id.* at 1171. The court cited in support of its ruling *Godine & Stunda, Inc. v. Reading Station Assocs. Ltd. Partnership*, No. Civ. 89-0514 (E.D. Pa. May 4, 1989), and *Whitney v. Citibank, N.A.*, No. 81 Civ. 5832 (CBM) (S.D.N.Y. Apr. 19, 1985), both cases in which a partnership was determined not to be an indispensable party in litigation where the partners were parties.

Whitney, the only one of the cited cases to consider the rule 19(b) question in a post-trial posture, is particularly relevant here. Noting that "there would be great prejudice to [plaintiff] to force him to relitigate this complex case at great expense, particularly when the court has already found that his rights were wilfully violated by defendants," slip op. at 11-12, the court concluded that "[t]o dismiss the present action because a dissolved partnership, which holds no meaningful assets and whose partners are all before the court, cannot be joined as a party would be to exalt form over substance and frustrate the intent of Rule 19," *id.* at 12.

Although *Provident Tradesmens* teaches that the proper resolution of a rule 19(b) question "can only be determined in the context of particular litigation," 390 U.S. at 118, *Whitney* appears to be the most closely analogous precedent to the situation presented herein. In any event, addressing the particularities of this litigation, we see no reason, at this belated juncture, to pro-

vide BCI and Brignoli with "a windfall escape from [their] defeat at trial." *Provident Tradesmens*, 390 U.S. at 112. "After trial, considerations of efficiency of course include the fact that the time and expense of a trial have already been spent." *Id.* at 111. Further, plaintiffs' "interest in preserving a fully litigated judgment should be overborne only by rather greater opposing considerations than would be required at an earlier stage when the plaintiffs' only concern was for a federal rather than a state forum." *Id.* at 112.

We accordingly conclude that BCR may be dropped as a party defendant, confident that the district court, with all the partners before it,[9] will be able to deal with any resulting difficulties "by protective provisions in the judgment, by the shaping of relief, or by other measures." Fed. R. Civ. P. 19(b).

Conclusion

For the foregoing reasons, we recharacterize this lawsuit as a class, rather than a derivative, action, and dismiss BCR as a party. We then confirm the existence of subject matter jurisdiction. Having done so, we affirm the judgments of the district court on the merits for the reasons stated in the opinion of the district court, and remand for further proceedings not inconsistent with this opinion.

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9 *See supra* note 7.

APPENDIX B-ORDER OF UNITED STATES COURT OF APPEALS DENYING PETITION FOR RE-HEARING IN BANC DATED NOVEMBER 6, 1990

United States Court of Appeals
for the Second Circuit

/STAMP/
United States Court of Appeals, Second Circuit
Filed November 6, 1990
Elaine B. Goldsmith, Clerk

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 6th day of November, one thousand nine hundred and ninety-one.

DOCKET NUMBER 89-7979

----------x

JOHN J. CURLEY, JAMES KARANFILIAN and DUANE ROBERTS, individually and on behalf of BRIGNOLI, CURLEY & ROBERTS ASSOCIATES, a Delaware limited partnership,

Plaintiff-Appellees,

v.

BRIGNOLI, CURLEY & ROBERTS ASSOCIATES, a limited partnership, BRIGNOLI & CURLEY, INC., and RICHARD BRIGNOLI,

Defendants,

BRIGNOLI & CURLEY, INC. and RICHARD BRIGNOLI,

Defendants-Appellants,

BRIGNOLI MODELS, INC.,

Appellant.

----------x

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by defendants-appellants, Brignoli & Curley Inc. and Richard Brignoli

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

APPENDIX C-OPINION AND DECISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED AUGUST 4, 1989

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHN J. CURLEY, JAMES KARANFILIAN and DUANE ROBERTS, individually and on behalf of BRIGNOLI CURLEY & ROBERTS, ASSOCIATES, a Delaware Limited Partnership,

Plaintiffs,

88 Civ. 5307(MP)

-against-

BRIGNOLI CURLEY & ROBERTS ASSOCIATES, a limited partnership, BRIGNOLI & CURLEY INC. and RICHARD BRIGNOLI,

Defendants.

OPINION AND DECISION

Appearances:

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MILTON POLLACK, Senior United States District Judge

Overview

This phase of the litigation between the parties seeks the equitable intervention of this Court in a partnership dispute. Plaintiffs, limited partners, claim defendants, the

General Partner and its Chief Executive Officer, breached their fiduciary duties, misappropriated and mismanaged and misused partnership assets and facilities.

John J. Curley, James Karanfilian and Duane Roberts, limited partners of Brignoli, Curley & Roberts Associates ("BCR"), a Delaware partnership, sue for removal of the corporate General Partner or alternatively dissolution of BCR, an accounting and damages arising from various breaches of fiduciary duty to BCR and its limited partners. They name as defendants (1) Brignoli & Curley, Inc. ("BCI"), the General Partner of BCR and a Delaware corporation; (2) BCR as a necessary defendant; and (3) Richard Brignoli, the principal shareholder and Chairman and President of Brignoli Models, Inc. ("BMI"), a limited partner of BCR; Brignoli is also Chief Executive Officer and President of BCI.

Jurisdiction of this Court is posited on diversity of citizenship and requisite amount in controversy.

The corporate General Partner, BCI, and defendant Brignoli, denied liability and asserted an assortment of affirmative defenses as well as counterclaims for damages in favor of the partnership against those limited partners who are plaintiffs herein, for their alleged fiduciary and contractual breaches as such limited partners. In addition, the General Partner, BCI, asserted on behalf of the partnership, so-called "counterclaims" against third-parties, for damages arising from alleged misperformance of contractual obligations of the latter to the partnership.

Jury and non-jury issues were thus posed and the third-party "counterclaims" were bifurcated and were tried to a jury. A verdict of no liability in favor of the counterclaim-defendants was returned by the jury. Final judgment was entered thereon.

Thereafter, the principal claims asserted in the complaint as well as the defenses thereto, were tried at a Bench trial with the use of the record made before the jury. The counterclaims of the defendants against the plaintiffs were set apart to await a determination of whether there would be a dissolution of the partnership as demanded in the complaint and heard in the accounting among the partners to follow.

At the conclusion of the Bench trial, the Court finds as fact that inadequacy of legal remedies and irreparable harm have been adequately demonstrated and that it is not reasonable practicable or equitable to carry on the business in conformity with the BCR Partnership Agreement. See Del. Code tit. 6, § 17-803 (1985 Interim Supp.).

Briefly:

Richard Brignoli, who, late in 1987, assumed the title of Chief Executive Officer of the corporate General Partner, has been guilty of and has caused BCI to be guilty of such crass and autocratic conduct in the service of his selfish interest and in derogation of the interests of the limited partnership so as to affect prejudicially the carrying on of the business as a partnership. There are myriad facts and circumstances in evidence which warrant a Court of

equity to remove the General Partner and to install in its place a receiver until the limited partners of BCR can determine whether they wish to continue the business under a trusteeship or to dissolve the business and have an accounting as the equitable solution of the controversy herein.

The evidence adduced at trial amply established glaring misconduct by Brignoli and BCI. The limited partners were denied access to the partnership books and records and the assets of BCR were grossly misused by BCI and Richard Brignoli, including the misuse and pledge of a $175,000 certificate of deposit ("CD") owned by BCR as security for a bank loan to pay the bills of BMI, an entity controlled by Richard Brignoli of which he is Chairman and President and principal owner. BCI and Richard Brignoli have attempted to confuse and cloud the facts of their administration of the partnership with extravagant counter-charges and criticisms of the business practices of the limited partners-plaintiffs. These are merely part and parcel of the mistaken notion that Richard Brignoli was not accountable to anyone in his autarchical control of BCI and the affairs of the BCR partnership.

The incriminations and recriminations as between the partners cannot offset or cause us to overlook the abuse of the partnership assets and the bad faith of an excesses to which Richard Brignoli has gone to the detriment of the interest of the other partners.

For the reasons shown hereafter, an interlocutory judgment installing a receiver for BCR to conduct the

business pending a vote of the limited partners other than BMI whether to continue or dissolve the business, will be ordered herein. In the event dissolution is ordered thereafter, the counterclaims asserted by the present General Partner, BCI, in its pleading can then be considered to the extent appropriate in the accounting to follow. If no dissolution is to be ordered, a trustee can pursue such counterclaims as are not precluded by the judgment on the jury's verdict on the issues resolved in the jury trial.

I. The Background

A. The Parties

BCR is a Delaware limited partnership with its principal place of business at 15 West 39th Street in New York City. BCR was formed in 1984 in order to engage in the business of providing investment advisory and management services, investment and merchant banking and securities placements. (BCR Partnership Agreement, §1.4). There are thirteen limited partners.

The General Partner of BCR is BCI a Delaware corporation whose principal place of business also is in New York City. The shareholders of BCI are Richard Brignoli, as trustee, and John Curley. Brignoli owns 50.1% of BCI's stock and Curley owns 49.9%. Under Section 2(b) of the BCI Shareholders' Agreement, Brignoli serves as Chairman of the BCI board of directors which "shall at all times consist of a majority of directors designated by Brignoli."

Brignoli Models Inc. ("BMI"), is a 54% investor in the BCR limited partnership. BMI is owned by approximately ten stockholders of whom Richard Brignoli is the majority stockholder. BMI develops and markets computer programs for trading securities. BCR licensed the Excess Growth System Program from BMI for trading equity portfolios. As of September 2, 1987, BCR had successfully marketed Excess Growth under the leadership of John J. Curley as CEO to approximately twenty pension fund clients for whom BCR was managing over $1.2 billion in assets using Excess Growth.

B. Undisputed Matters

Curley acted as CEO and President of BCI, the General Partner, from October 1, 1984 to October 1, 1987, pursuant to a written employment agreement between himself and BCI. Curley managed the BCR partnership during that period and together with others he employed were largely responsible for the phenomenal growth of BCR during the next three years. BCI through Curley, hired Roberts on September 11, 1984 to serve as the director of marketing for BCR. Roberts also received an equity interest in BCR. From October, 1985 through January, 1988 BCR also through Curley, employed Karanfilian as an investment officer also with an equity interest in BCR. Curley, Roberts and Karanfilian collectively held approximately 36% of the equity of BCR.

From 1985 through the present, BMI was also a limited partner of BCR and held approximately 54% of its equity. Nine other limited partners hold the remaining

equity of BCR together with BCI which holds 1%. The value of each plaintiff's limited partnership interest exceeds $10,000.

On October 1, 1984 Curley on behalf of BCR entered into a licensing agreement with BMI to market a computer program designed by BMI. The computer program was called Excess Growth.

The Excess Growth system produced on a trade blotter a list of trades of securities which were to be accomplished on a daily basis. The consolidated trade blotter contained the name of the security, the number of shares to be bought or sold, and a "limit" price for the shares to be bought or sold for BCR's client portfolio.

It was not anticipated that all of the trades designated by the blotter would be completed each trading day.

Each night, the Excess Growth computer program automatically recalculated and adjusted the portfolios. The program recalculated the appropriate mix of securities to be held in the portfolio as it existed at the conclusion of the previous day's trades. Only those trades which were called for on the new daily blotter were to be executed.

Some time during the summer of 1985 Curley began using Richard Bennett to do the trades called for by the daily blotter. Curley had known Bennett for a number of years. On or about June 9, 1985 Bennett formed Brick Securities, Inc. ("Brick"). BCR hired Brick and Brick's

principal, Richard Bennett, to provide supervisory and trading functions for all of BCR's trading activities on behalf of BCR's clients. Brick was a licensed broker. Curley, Roberts, Karanfilian and Brignoli later became limited partners in Brick. Curley acted as the supervisor of the trades that Brick was performing for BCR.

C. **Disputes Among the Partners**

Beginning in or about June of 1987, disputes arose between Curley and Brignoli. Brignoli chose not to license BCR to market a new BMI program named Index Plus. Curley was keenly interested in obtaining those rights for BCR.

About the same time, Brignoli, after allegedly receiving complaints about Brick's performance, began to investigate Brick's trading in September 1987. According to Brignoli, further investigation in October of 1987 disclosed a "huge backlog" at BCR of transactions listed on the trade blotters that had not been executed. In November of 1987, Brignoli expressed his interest in having firms other than Brick execute the trades for BCR. Curley opposed this idea.

Meanwhile, the BCI Board of Directors held a meeting on November 23, 1987. Prior to the meeting, Curley stated that he could not attend a meeting until December 1. The BCI board had never before met when Curley was unable to attend.

At the November 23 meeting, the "board" of BCI -- Brignoli, Mr. Debe (Brignoli's uncle) and Mr. David (Brignoli's attorney) -- adopted resolutions that: (a) gave Brignoli control over what broker would execute commission trades for BCR clients; (b) allowed Lawrence Goldfein an attorney and business associate of one of the principals of Intervest, to be hired as an administrative consultant; and (c) appointed Brignoli to replace Curley as Chief Executive Officer of BCI.

Brignoli thereafter engaged BMI to produce "Stock Sleuth," a program designated to evaluate the effectiveness of a securities trader. He used Stock Sleuth purportedly to investigate the source of the BCR trading backlog. BMI billed BCR for huge costs for developing Stock Sleuth and conducting the related "investigation," without the approval of the limited partners or the BCI board of directors.

After the "investigation" was completed, Brignoli called a meeting with Curley, Bennett, Roberts and Karanfilian held in Brignoli's office December 11, 1987 purportedly for explanations. The charade over, later that day, Brignoli unilaterally dismissed Bennett and Brick as traders for BCR and he proceeded with what clearly was his plan all along. On the same day, December 11, 1987, Brignoli directed all BCR trading to be executed by Intervest, an entity in which Brignoli indirectly had a substantial interest. On December 18, 1987, the BCI board of directors at Brignoli's instigation, voted not to renew

Curley's contract of employment and to relieve him of all duties with respect to BCI and BCR.[1]

Karanfilian voluntarily left BCR in January, 1988. Roberts was fired in March 1988. Curley, Karanfilian and Roberts have since started a new money management firm, Cornerstone Asset Management, L.P., which they currently operate.

D. The Law Suit

This action was commenced on July 29, 1988. Plaintiffs claim defendants breached their fiduciary duties to BCR and its limited partners because (1) Brignoli, BCI and BCR refused them access to the books and records of BCR, (2) Brignoli used a BCR CD for $175,000 to secure a bank loan to BMI, from proceeds of which he paid BMI bills, (3) Brignoli authorized huge payments to BMI for "trading audit services" and "trading cost analysis" which were not necessary or for the benefit of BCR, and (4) Brignoli operated BCR in bad faith and in an autocratic

[1] At this time, the BCI board consisted of Brignoli, his uncle, his attorney (all BMI shareholders) and Curley. Curley cast the lone vote for renewal. Curley's employment contract with BCI had expired in October of 1987. He had continued his employment without a contract. This created a hiring at will after October 1987. Defendants, throughout the trial attempted to make much of this "non-renewal" characterization. Curley was then fired by Brignoli on December 18, 1987.

manner to benefit himself and his controlled companies at the expense of BCR. Plaintiffs seek removal of BCI as General Partner, or, alternatively, dissolution of BCR and an accounting. They further seek compensatory damages on their derivative claim brought on behalf of BCR against Richard Brignoli.

Defendants asserted six affirmative defenses: (1) lack of subject matter jurisdiction, (2) failure to first demand relief from BCR before bringing suit on plaintiffs' derivative claim, (3) lack of standing on the part of plaintiffs to sue on behalf of BCR, (4) failure to state claims upon which relief can be granted, (5) that the payments to BMI were necessary and reasonable, and (6) that plaintiffs have unclean hands.

In third-party claims (denominated by them as counterclaims) Brignoli on behalf of BCR and BCI claimed Brick and Bennett had caused a backlog in trading that, in turn, caused under-performance in the portfolios managed by BCR. A jury absolved Brick and Bennett of any liability on the issues raised by Brignoli in these third-party claims.

Using BCR as a claimant, BCI and BMI had mingled their third-party claims against Brick and Bennett with their counterclaims against the BCR limited partners. The counterclaims against the limited partners were set apart by the Court to be considered at a later date. Those counterclaims associated the plaintiffs-limited partners with Brick and Bennett's alleged malperformance and

misconduct, and demanded damages from the limited partners on behalf of BCR.

The counterclaims referred to above ar as follows:

1st Claim (against Brick Associates): Breach of Contract with BCR. Relief Sought: $20 million damages.

2nd Claim (against Brick Associates, Bennett, Curley, Karanfilian, and Roberts): Interference with Contract. Relief Sought: $30 million damages.

3rd Claim (against Brick Associates, Brick Partners, Bennett, Curley, Karanfilian, Roberts): Interference with Contract. Relief Sought: $30 million damages.

4th Claim (against Curley): Breach of Contract with BCI. Relief Sought: $30 million damages.

5th Claim (against Curley and Roberts): Defamation and Trade Disparagement. Relief Sought: $20 million damages.

6th Claim (against Bennett, Curley, Roberts, and Karanfilian): Negligence. Relief Sought: $20 million damages.

A jury trial was held from June 6 through June 12, 1989, which focused on the counterclaims against Brick

and Bennett although the plaintiffs were also charged therein. A Bench trial was held on the equitable issues from June 12, 1989 through July 10, 1989. Defendants had moved in advance of the trial for partial summary judgment, the motion being returnable at the commencement of the trial. The motion sought dismissal of plaintiffs' first claim for relief (removal of the General Partner or dissolution of the partnership), and an order directing plaintiffs to surrender their interests in BCR to defendants in return for payment. The court took no action on the motion other than to try the issues posed in the Bench trial.

II. Diversity Jurisdiction

Jurisdiction herein is posited on diversity of citizenship and the requisite amount in controversy. Defendants claim diversity was destroyed because plaintiff Roberts and defendant Brignoli are both citizens of Connecticut. The complaint had asserted that Brignoli was a citizen of New York. A decision of a Judge of this court had so found in another case.[2] Brignoli claimed a change of residence since that finding. If there was anything to Brignoli's assertion that he had moved from New York to Connecticut just before this suit, the diversity matter was completely cured when Roberts, a proper but unnecessary limited partner-plaintiff was dropped from the suit before plaintiffs rested plaintiffs' case. Fed. R. Civ. P. 21.

[2]Brignoli v. Balch, Hardy & Scheinman, Inc., 696 F.Supp. 37, 42 (S.D.N.Y. Oct. 4, 1988) (Sweet, J.).

III. The Claims for Equitable Intervention

The applicable legal principles and the claims of the plaintiffs which warrant equitable relief are as follows:

One standing in a fiduciary relation with another is liable to the other for harm resulting from a breach of fiduciary duty arising from the relationship. Restatement of Torts (Second) §874. "Although there is no set formulation of the fiduciary duties of partners, the main elements of the obligations owed by one partner to another have been defined as 'utmost good faith, fairness, loyalty.'" Newburger, Loeb & Co., Inc. v. Gross, 563 F.2d 1057, 1078 (2d Cir. 1977) (quoting Crane and Bromberg, Law of Partnership, §68 at 390 (1968)), cert. denied, 434 U.S. 1035 (1978). See also, Boxer v. Huskey Oil Co., 429 A.2d 995, 997 (Del. Ch. 1981).

A partner is prohibited from self-dealing during the duration of the partnership and profits made through self-dealing belong to the partnership. In re Kohn's Estate, 26 Misc. 659, 116 N.Y.S.2d 167, 172 (1952), aff'd, 282 App.Div. 1045, 126 N.Y.S.2d 897 (1953). One partner may not wrongfully appropriate partnership property. Duncan v. Bruce, 43 N.Y.S.2d 447, 179 Misc. 992, 993 (N.Y. Sup. Ct. 1943).

A. Access to BCR's Books and Records

Plaintiffs claim BCI and Brignoli breached their fiduciary and statutory duties by failing to provide access to BCR's books and records. Defendants claimed that Arie

David, BCR's attorney, had arranged a meeting for an inspection. The defendants claimed that Jeffrey Zell, BCR's and BMI's accountant, was to meet with Robert Wishnew, CPA, the accountant for the plaintiffs and former accountant for BCR on June 6, 1988. The purpose of this meeting was to permit Wishnew, on behalf of the plaintiffs, to inspect BCR's books and records.

Wishnew testified no meeting was ever arranged by David or Zell. Further, Wishnew had not spoken to Zell regarding the meeting to Wishnew, his only communication with David on this matter was a June 23, 1988, telephone conversation made over two weeks after the June 6th meeting was to have taken place. In that conversation, David stated Wishnew would be denied access to the books and records of BCR unless Brignoli was given access to Brick's books.

Zell testified that he "believed" he had spoken with Wishnew about a meeting prior to June 6, 1988 via telephone, but he could not recall what was said or who initiated the call.

The Court finds that a meeting was never arranged and Wishnew was never provided with access to BCR's books and records. Zell never attempted to reschedule the meeting and never inquired as to why Wishnew did not come to the meeting.

The Court finds the meeting arrangements were a sham orchestrated by David. This was a thinly veiled attempt to disguise the defendants' refusal to provide

plaintiffs with access to BCR's books and records. Zell's testimony was evasive and not worthy of belief. Wishnew's evidence was thoroughly credible and believable.

All partners are entitled at all times to have access to and may inspect, partnership books and records. Del. Code tit. 6, § 17-305. BCI and Brignoli, breached their fiduciary and statutory duties to provide plaintiffs' access to BCR's books and records.

B. Pledge by Brignoli of the BCR Certificate of Deposit For a Loan to BMI.

Plaintiffs next claim Brignoli misappropriated BCR assets for his own benefit. Brignoli does not dispute that in 1988, he used a $175,000 certificate of deposit ("CD") owned by BCR to secure a bank loan for BMI without prior knowledge or authorization of the BCI board of directors. Brignoli did not tell the bank officer of the purpose of the loan. Brignoli contends, however, (1) he was generally authorized to take such action under the Partnership Agreement[3] as the representative of the General Partner, BCI, and (2) that the purpose of the pledge and bank loan was to secure payment for

[3] Article 4.1(f) provides "the General Partner, in his sole and absolute discretion, shall have the full right, power and authority from time to time, and any time on behalf of the Partnership . . .[t]o execute and deliver promissory notes, guarantees, agreements and other instruments."

"investigation" services that BMI rendered or was to furnish to BCR.

Neither alibi justifies Brignoli's clear breach of his fiduciary duties by misappropriating BCR's assets. Even assuming, arguendo, that the Partnership Agreement authorized Brignoli to pledge BCR's assets in general for bank loans, it seems ludicrous to postulate he was authorized to do so to BCR's detriment and to the benefit of himself and an entity in which he was personally interested and controlled; neither was "on behalf of the Partnership" as required by the Partnership Agreement.

Brignoli admitted on cross-examination that he obtained the $175,000 loan and the proceeds were used by BMI to pay BMI bills. The loan and security agreements were entered into after BMI had advanced $122,000 to an "unknown entity" at One Exchange Plaza, New York, NY -- the same business address of Intervest, the entity chosen by Brignoli to execute BCR's trades after the dismissal of Brick. Although Brignoli claims the loan was not made to Intervest, Intervest is repaying the loan. The balance of the loan has never been repaid to the bank which continues to hold the CD as security. Brignoli's testimony was a patent attempted cover-up for a fraudulent act on his part.

The Court finds the Partnership Agreement did not authorize Brignoli to pledge the BCR CD. The pledge was in fact a misappropriation of the partnership's assets for the benefit of BMI. Such conduct constituted a breach of fiduciary duty owed by Brignoli and BCI to BCR, and

Brignoli is liable to BCR for the amount required to repay the bank and release the CD to BCR.

C. Payments to BMI for "Trading Audit Services and "Trading Cost Analysis.

After Brignoli terminated Curley, Bennett and Brick in December, 1987, he engaged BMI to conduct several trading performance studies to "investigate" Brick's effectiveness in executing the trades called for by the BMI computer system. The fees BMI charged BCR for these alleged studies totaled approximately $500,000 or more which included $250,000 for the development of "Stock Sleuth," a computer program that was designated to measure the performance of stock traders by, inter alia, a comparing of the trades requested on the trading blotter versus the number of trades executed. However, Brick did trading for at least three other BMI licensees and BMI did not charge them for these services. Brignoli distinguished those cases by stating BCR was the only licensee he was responsible for and that BCR was also the money manager on the pension accounts.

Prior to December 1987, BMI had never been hired by anyone or shown any proficiency to do trading audit services. Brignoli hired BMI to render trading audit services disdaining to obtain a price quote from Abel Noser, SEI or any other qualified firm which regularly provides such services. Brignoli stated he did not obtain a cost estimate because these other firms could not adapt their software to Brignoli's specifications. Yet, two experts, including one called by the defendants, testified

Stock Sleuth could be recreated fairly easily and inexpensively. The experts' price quotes ranged from $74,000 to $80,000[4]. Brignoli in effect caused BCR to be charged by his controlled company, BMI, a total of $250,000 for the caper.

The hiring of BMI to render trading audit services was not formally presented to the BCI board of directors and it was not discussed with Curley. BMI carried out the services and billed BCR for the time spent on the project using a salary multiplier in excess of three times the salaries of BMI employees utilized in providing the services.

Brignoli justified the billing rates by stating Curley had approved the use of a salary multiplier in another circumstance when he approved the payment of certain production fees paid to BMI by BCR. Because the initial production cost agreement reached between Curley and BMI was not brought to the BCI board of directors for

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[4]These estimates did not include the expense of formulating the parameters for the study. However, the fact that Brignoli hired BMI without obtaining BCI's approval or outside estimates constitutes a breach of fiduciary duty. Such self-dealing is prohibited if not fully disclosed and authorized, regardless of whether it may be "fair" to the partnership. See A. Bromberg and L. Ribstein, Bromberg and Ribstein on Partnership, § 6.07(b) (1988) ("If there is no informed consent, the mere fact that the transaction is fair to the partnership may be insufficient to validate it.").

approval, Brignoli said he did not feel he was required to present the extraordinary and unusual "trading audit services" and "trading cost analysis" employment to the BCI board. Curley, however, was not financially connected to BMI, and independently approved the amount of fees, the scope of the services, and the provider of the services, all in the usual course of business as an ordinary current incidental expense.

D. Other Claims of Self-Dealing

Plaintiffs further claim Brignoli breached his fiduciary duty by (1) diverting BCR's trading operations to Intervest, an untried entity in which he has a substantial interest, (2) using BCR marketing staff to promote BMI products other than Excess Growth, and (3) placing BMI consultants and employees on the BCR payroll.

1. Intervest

In October of 1987, Brignoli unilaterally decided to transfer some of Brick's trading duties to an entity called Intervest. Brignoli maintained that he had no financial interest in Intervest. However, in October of 1987, he began contemplating a business combination that would have resulted in BMI having a 25% ownership interest in both Intervest and a firm referred to as "Delta." One of Intervest's principals, Jeff King, was one of the principals of Delta.

Brignoli was still contemplating their arrangement when he fired Curley and Brick and later hired Intervest.

Brignoli also personally loaned $500,000 to King for Delta's use, caused BMI to make a loan of $122,000 that Intervest was repaying, and caused BMI to secure a lease on office space that it sublet to Intervest and Delta.

Brignoli's financial interest, albeit a non-equity one, in Intervest and other related entities was substantial. Testimony at trial thus indicated Brignoli abused his position with BCR by replacing Brick with Intervest as part of a larger plan to "freeze out" the plaintiffs from a business they started, built from scratch and from which they had only begun to receive substantial benefit. Such a motivation stamps the actions of Brignoli and BCI as evidence of conduct in bad faith.

2. Marketing of BMI Products Using BCR Personnel

Testimony showed that in June of 1987, Brignoli asked Roberts, then head of marketing at BCR, to assist him in setting up the marketing effort for Volatility Capture System, a program similar to Excess Growth which was developed and marketed by Brignoli Advisors, another Brignoli-affiliated money management vehicle. Roberts refused, asserting that no benefit from this new program would accrue to BCR. In February of 1988, Brignoli told Roberts to "coordinate" his marketing efforts with Bill Morris, the marketing director at Brignoli Advisors. Again, Roberts refused. Roberts was fired the next month.

Bruce Kerr, Robert's replacement at BCR, was originally hired to market Volatility Capture for Brignoli

Advisors. Kerr stated that when he makes marketing calls on behalf of BCR, he "pitches" both Volatility Capture and Excess Growth to prospective clients, although Excess Growth is the "main thrust" of the presentation.

Annette Borenstein, a BCR marketing associate, was also originally hired by Brignoli Advisors. After Roberts was fired by Brignoli, Borenstein was transferred to the BCR payroll. At BCR she continued to complete investment advisor questionnaires for BMI.

It appears from the trial testimony that Brignoli's desire to successfully market Volatility Capture led him to misappropriate BCR's marketing resources for the benefit of his other company, Brignoli Advisors. Roberts had successfully marketed Excess Growth and Brignoli knew Roberts' assistance could lead to success for Volatility Capture. When Roberts refused, Brignoli demanded "coordination" of efforts to avoid embarrassment and confusion with prospective clients. However, this coordination included the sharing of the names of prospective clients and Roberts' plans for selling Excess Growth to them.

When Roberts refused to "play along" with Brignoli's game, he was fired and Brignoli assumed control of marketing for both products with all the attendant conflicts of interest. Again, the formerly active limited partners of BCR were the victims of a "freeze out," in this instance, designed to wrongfully exploit BCR's marketing system -- another instance of bad faith attributable to Brignoli and BCI through him.

3. BMI Staff on the BCR Payroll

The plaintiffs alleged and proved that after Brignoli successfully completed the "freeze out," BCR became a haven equipped with machinery to turn out benefits for himself, friends, family, BMI employees and shareholders.

After Brignoli fired Curley, Brignoli cause BCR to pay huge amounts to BMI for additional production services not covered in the BCR/BMI licensing agreement. Curley had previously negotiated for production payments of approximately $26,000 per month. Once Curley left BCR, BMI retroactively increased the costs billed to approximately $82,000 per month. No one at BCR negotiated the terms of the additional production fees; they were unilaterally set in place by Brignoli and BMI.

Brignoli also caused BCR to hire BMI employees at inflated rates to perform routine back office work for BCR. When two key back office staff members of BCR left in June of 1988, Brignoli "discovered a mess" in the BCR back office dating back six to nine months. Brignoli placed the blame for this "mess" on Curley even though Brignoli had been in charge of BCR for six months. Rather than simply hiring permanent BCR clerical staff to replace the departed BCR employees, Brignoli replaced them with BMI personnel and billed BCR for their services using a salary multiplier in excess of three times their actual BMI salaries. Brignoli testified the BCR back office now runs more efficiently and that the current average monthly BCR back office costs are comparable to the average monthly back office costs under Curley's tenure. However, BCR

now has only approximately $500,000 under management whereas under Curley, BCR has managed in excess of $1.2 billion.

At the same time, Brignoli increased his own wages paid by BCR. In 1988, Brignoli placed himself on the BCR payroll at a salary of $250,000 per year while still receiving a $175,000 salary for a second full-time position at BMI. Curley's contract only called for a salary of $150,000 per year from BCR. Brignoli testified he himself directed the amount of his salary as compensation for the work he performed in Curley's place after Curley was fired.

The trial testimony, however, showed that in 1988 Brignoli visited only one potential client of BCR and met with prospective clients in BCR's offices on two or three occasions. Testimony also showed he was largely ignorant of the day-to-day operations which Curley had formerly supervised. He remained unaware of BCR's billing practices and general financial affairs. Moreover, Curley previously received only $150,000 per year from BCR for actively overseeing BCR's operations and Curley did not hold a second full-time position at the same time.

Brignoli further directed BCR to pay a whole host of BMI employees and consultants for work performed for BMI, if at all. He had BCR pay a $50,000 advance retainer to Arie David, a BMI shareholder and outside counsel to BMI and attorney for Richard Brignoli, to be applied to future billings. No hourly accounting to support billings was supplied to BCR or submitted on this record

by David. BCR paid David the retainer and David's firm in addition charged BCR over $25,000 for work on a summary judgment motion that was never filed at that time; the "retainer" was never applied to those billings.

Joseph Debe, Brignoli's uncle, provided consulting services to BMI and had received approximately $50,000 per year for such services. In 1988, Brignoli placed Debe on the BCR payroll without Debe's knowledge at a salary of $100,000 per year. After the transfer, the services Debe provided were not altered. Debe testified he asked to be removed from the BCR payroll when he learned of the transfer, in part because he "didn't want or need" to be put on the payroll.

Brignoli also hired his "old sailing buddy" Robin Cotterell to do accounting work at BCR for $75,000 per year. Brignoli justified Cotterell's employment by stating Cotterell automated BCR's financial reporting system. Brignoli also testified, however, he had to fire Cotterell when he later discovered that Cotterell had charged large amounts of unauthorized personal expenses to BMI.

Robert Ince had been a consultant to both BCR and BMI. Prior to 1988, Ince had billed each entity separately for the services he rendered. After Brignoli assumed control of BCR, Ince testified that Brignoli directed him to bill BCR for all services rendered without regard to which entity received the benefit of his work.

Curley had refused to pay consulting fees to Professor Harry Markowitz. When Brignoli assumed

control of BCR, he approved payment of $3,000 per month in consulting fees to Markowitz.

When viewed in concert these acts provide mounting evidence of the degree of abuse and self-dealing in conducting BCR's affairs that Brignoli imparted during his tenure at BCI. This limited partnership whose continued existence depended on the good faith and fair dealing of the General Partner, has furnished the Court every reason for terminating the General Partner's tenure.

IV. Affirmative Defenses

Defendants defend their conduct by counter-accusations that plaintiffs have come before the Court with purportedly unclean hands. They assert plaintiffs have committed numerous securities, ERISA, and other statutory violations and breached their fiduciary duties to the clients of BCR primarily by engaging in cross-trading,[5], by failing to inform BCR's clients and the government of such cross-trading, by failing to keep proper records and falsifying other statutorily-required records pertaining to their cross-trading, by trading for personal accounts on inside information of what the clients were buying and selling, and by forming Cornerstone to compete with BCR for the provision of money management services.

[5]Cross-trading is where one broker represents both the buyer and the seller of a security and executes both the purchase and the sell side of the transaction, and receives a commission for both.

In so arguing, the defendants misinterpret the thrust of the clean hands doctrine:

> The rule is that unrelated bad conduct is not to be considered against the plaintiff. It is only when the plaintiff's improper conduct is the source, or part of the source, of his equitable claims, that he is to be barred because of his conduct. "What is material is not that the plaintiff's hands are dirty, but that he dirties them in acquiring the right he now asserts.***"

D. Dobbs, Remedies § 2.4 at 46 (1973) (quoting Republic Molding Corporation v. B.W. Photo Utilities, 319 F.2d 347 (9th Cir. 1963)).

Defendants have failed to demonstrate that plaintiffs' actions were somehow "the source of" defendants' clear violations of their fiduciary duties.[6] Plaintiffs acquired their rights against the defendants not

[6]Brignoli contended at trial that his pledge of BCR's certificate of deposit for a bank loan to BMI and BMI's performance of the trading investigation services were "caused" by the trading improprieties committed by Brick and Bennett in concert with the plaintiffs. However, Brignoli failed to obtain approval and a resolution of BCI's board before so acting. And the idea that plaintiffs somehow "caused" Brignoli to pledge BCR's certificate of deposit is ludicrous, especially given Brignoli's testimony that BMI's counsel, Arie David, had advised him not to do it.

through any misconduct on their own part, but by their mere status as limited partners of an entity which defendants have mistreated an abused. Moreover, the Partnership Agreement specifically provides that limited partners may engage in competing activities.[7]

Defendants next argue plaintiffs lack standing to bring suit "on behalf of" BCR, and have failed to fulfill the statutory requirements for bringing their derivative claim by failing to first demand relief from BCR.

A limited partner may bring an action on behalf of the partnership to recover a judgment in its favor if the general partners with authority to so have refused or if an effort to cause those general partners to bring the action would not likely succeed. De. Code tit. 6, § 17-1001.

[7]Section 4.4 of the Partnership Agreement provides:

> "[N]either this Agreement nor any activity undertaken on behalf of the Partnership shall prevent the Limited Partners from engaging in any other activities or businesses or from making investments, whether or not such activities, businesses or investments are similar in nature to the business of the Partnership, whether individually or jointly with others, without any obligation to account to the other Partners for any profits or other benefits derived therefrom, and without having to offer an interest in such activities, businesses or investments to the other Partners.

The complaint must set forth with particularity the effort of the plaintiff to secure initiation of the action or the reasons for not making an effort. Id § 17-1003.

Paragraph 16 of plaintiffs' complaint states:

> Given the refusal by BCI to comply with the statutory obligation to provide access to the partnership's books and records...as well as other refusals to provide information, a demand upon BCI to redress the breaches of fiduciary duty complained of herein would be futile.

Plaintiffs have clearly set forth why an effort to cause BCI to bring such an action would not likely succeed. They have also included in the complaint their reasons for not making such an effort. Therefore, the statutory requirements for bringing the derivative claim have been met.

Moreover, the statute by its terms does not indicate the plaintiffs must somehow show their moral worthiness to bring suit in their derivative capacity. Defendants, without citing authority for the proposition, argue plaintiffs may not bring suit on behalf of BCR in light of their participation in Cornerstone, a money management enterprise which allegedly competes with BCR. Such activity is neither prohibited by the Partnership Agreement nor by statute. Plaintiffs have fulfilled the statutory requirements for bringing a derivative suit against Brignoli

for misappropriation of assets and damages, and they may do so.

Defendants next contend the BCR Partnership Agreement exempts their good faith conduct from liability unless the conduct constitutes "gross negligence, willful misconduct or recklessness." This Agreement simply misreads the terms of the Partnership Agreement, which provides:

> 4.3 Indemnification of General Partner. The General Partner shall not be liable to the Partnership or to any Limited Partner for any act or omission in good faith and within the scope of the authority conferred by this Agreement. The Partnership shall indemnify and save harmless the General Partner from and against any and all liability, loss, cost, expense or damage incurred or sustained in the conduct of the business of the Partnership within the scope of the authority conferred by this Agreement; provided, however, that the General Partner shall not be entitled to any indemnification in the event any such liability, loss, costs, expense or damage is incurred or sustained as a result of the General Partner's gross negligence, willful misconduct or recklessness.

By its terms the Agreement provides that BCR will indemnify BCI unless BCI acts willfully or recklessly; it does not provide that the limited partners may not successfully recover damages directly from BCI or Brignoli for misconduct which was merely negligent. The

Agreement only exempts conduct performed "in good faith" and "within the scope of the authority" of the Partnership Agreement. Since defendants' conduct was neither performed in good faith nor within the scope of the authority conferred by the Agreement, see discussion infra, the plaintiff limited partners may properly bring suit against them.

Defendants remaining affirmative defense -- that the payments to BMI were necessary and reasonable -- and the Second, Third and Sixth Counterclaims against plaintiffs and Roberts are precluded by virtue of the jury verdict rendered in favor of Brick and Bennett on the claims which overlap those now asserted against plaintiffs and Roberts.

The counterclaim complaint based the overlapping claims primarily on allegations that Brick failed to execute the "vast majority" of trading requests on the trading blotter, and that Curley and Bennett failed to properly supervise Brick's trading. The pre-trial order submitted and signed by defendants' counsel on the jury claims further stated Bennett, Brick, Curley, Roberts and Karanfilian "acted in concert" to breach their fiduciary duties to BCR, and that Bennett and Brick's failure to trade the requested securities and their alleged use of knowledge of the merchandise which BCR's client were trading were done "with the understanding and knowledge of Curley, Karanfilian, and Roberts." The counterclaim plaintiffs presented evidence, and the jury was instructed, on each of these allegations. The jury returned a verdict in favor of Brick and Bennett.

The defendants are bound by the jury's resolution of the counterclaims against Brick and Bennett which are also material to the equitable claims asserted by plaintiffs. Beacon Theaters, Inc. v. Westover, 359 U.S. 500, 508 (1959). And to the extent the counterclaims were resolved against BCI and Brignoli, the judgment thereon may be used under the doctrines of res judicata or collateral estoppel to preclude the additional counterclaims BCI and Brignoli have asserted against plaintiffs and Roberts for their alleged misconduct while acting in conjunction with Brick and Bennett. N.L.R.B. v. United Technologies Corp., 706 F.2d 1254, 1259, 1260 (2d Cir. 1983) (Kearse, J.). This effectively disposes of defendants' "necessary and reasonable" defense as well as the Second, Third, and Sixth counterclaims lodged against plaintiffs and third-party defendant Roberts. The remaining counterclaims -- for breach of contract against Curley and defamation and trade disparagement against Curley and Roberts -- may be tried in connection with a partnership accounting. See Mack v. White, 35 Del. 289, 165 A. 150 (Del. Sup. Ct. 1933).

5. Relief Granted

The Delaware Revised Uniform Limited Partnership Act provides:

> On application by or for a partner the Court...may decree dissolution of a limited partnership whenever it is not reasonably practicable to carry on the business in conformity with the partnership agreement.

Del. Code tit. 6, §17-803.

The Delaware Uniform Partnership Act further provides that the Court may order a dissolution as provided by statute when, inter alia, (1) a partner "has been guilty of such conduct as tends to affect prejudicially the carrying on the business", (2) a partner "so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him", or (3) "other circumstances may render a dissolution equitable". Del. Code tit. 6, §17-1532.

These "other circumstances" include such infractions as breach of fiduciary duty, May v. Flowers, 483 N.Y.S.2d 551, 106 A.D.2d 873 (N.Y. App. Div.), appeal dismissed, 64 N.Y.2d 611, 491 N.Y.S.2d 1025, 480 N.E.2d 749 (1985), misappropriation of assets, Duncan v. Bruce, 43 N.Y.S.2d 447, 179 Misc. 992, 993 (N.Y. Sup. Ct. 1943), and refusal to permit the inspection of the books, records or documents. Susman v. Venture, 70 Ill. Dec. 269, 449 N.E.2d 143, 148, 114 Ill. App.3d 668 (1982).

The extreme level of gross misconduct and arbitrary management of BCI's affairs willfully committed by Brignoli in his capacity as majority shareholder of BCI indicates it is not reasonably practicable to carry on the business of BCR with BCI remaining as the General Partner. The Court concludes BCI's presence as General Partner poses a serious and immediate threat of further

misappropriation of BCR funds and of further ultra vires acts.

Defendants, however, have strenuously argued against immediate dissolution of the partnership as a going concern. Under its inherent equitable powers the Court concludes BCI is legally incapable of performing its statutory duties as the General Partner of BCR fairly and in good faith, and therefore grants Plaintiffs' more limited request for removal of BCI as the General Partner, and will appoint an interim receiver until such reasonable time as a majority of the limited partners exclusive of BMI vote to continue the partnership and appoint one or more new General Partners as successor to BCI. See J. Crane, Handbook on the Law of Partnership (1952) p. 418 ("In a business trust [defined as analogous to a limited partnership], fraudulent or other seriously improper conduct on the part of the trustees [general partners] may be a sufficient reason for their removal by a court of equity, but it is not necessary that the trust be wound up." *May v. Flowers, supra* at 553 (action of general partner and limited partner in assigning equipment lease to the partnership in return for partnership's assumption of lease obligations made by the general and limited partner to the other limited partner was breach of fiduciary duty warranting expulsion of general partner and limited partner from partnership, dissolution of partnership, and rescission of assignment).[8]

[8] Upon removal of BCI as the General Partner of BCR, the BCI Shareholders Agreement will also be terminated automatically under Section 5(b) of that agreement.

The vote of the limited partners shall be carried out according to the terms of the Partnership Agreement, which provides:

> If the General Partner [BCI] shall withdraw or retire after August, 1987 . . . then the General Partner or its legal representative shall promptly notify the Limited Partners thereof and shall dissolve the Partnership, unless a majority in interest of the Limited Partners, exclusive of Brignoli Models, Inc., shall desire to continue the Partnership and appoint one or more new general partners as successor to the General Partner.

Article VI, Section 6.1(b).

If the limited partners decide to continue the Partnership, they shall appoint a new General Partner as further provided by Section 6.1(b) of the Partnership Agreement. If they do not so vote to continue the Partnership, it shall be dissolved, an accounting shall be had, and its affairs wound up pursuant to Sections 17-801 and 17-802 of title 6 of the Delaware Revised Uniform

Limited Partnership Act and sections 7.1 through 7.4, inclusive, of the Partnership Agreement.[9]

BMI will be enjoined from voting its interest in BCR for the selection of a successor General Partner if the limited partners vote to continue the Partnership, or for the

[9] Section 17-802 provides:

> On application by or for a partner the Court of Chancery may decree dissolution of a limited partnership whenever it is not reasonably practicable to carry on the business in conformity with the partnership agreement.

Delaware Code, tit. 6, §17-802 (1985 Interim Supp.).

Section 17-801 further provides that upon entry of a decree of judicial dissolution under §17-802 or upon withdrawal of a general partner, "[a] limited partnership is dissolved and its affairs shall be wound up." Id. §17-801.

selection of a liquidating trustee if the limited partners vote to dissolve the partnership under section 7.2 of the Partnership Agreement.[10] In the event of default of the limited partners' in selection of a liquidating trustee upon a vote for dissolution of the partnership, the Court will appoint a liquidating trustee to wind up the partnership affairs.

[10] Section 7.2 of the Agreement provides in relevant part:

> Liquidating Trustee. Upon dissolution of the Partnership, the liquidating trustee (which shall be the General Partners, unless all general partners are the subject of one of the events set forth in subsection (a) of Section 7.1 [including legal incapacity or withdrawal of the General Partner], in which case a person selected by a majority in interest of the Limited Partners shall be the liquidating trustee) shall proceed diligently to wind up the affairs of the Partnership and distribute its assets to the Partners in accordance with their respective capital accounts.

The Court further awards, on plaintiffs' derivative claim for relief, damages to BCR, the nominal party-defendant, against defendant Richard Brignoli in the amount of $175,000 or such amount as is necessary to be paid to Republic National Bank of New York to release the converted CD belonging to BCR.

The "counterclaims" against plaintiffs and Roberts which are not precluded by the judgment on the jury's verdict may be pursued either by the new BCR General Partner or the liquidating trustee within the context of a proceeding for an accounting.

Accordingly, an interlocutory judgment providing for relief set forth above shall be entered herein. A proposed form of such judgment shall be submitted on or before August 16, 1989, on five days' notice.

The foregoing shall constitute the findings of fact and conclusions of law required by Fed. R. Civ. P. 52(a).

SO ORDERED.

Dated: August 4, 1989 Milton Pollack
Senior United States District Judge

APPENDIX D-JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED AUGUST 27, 1989

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

JOHN J. CURLEY, JAMES KARANFILIAN and DUANE ROBERTS, individually and on behalf of BRIGNOLI CURLEY & ROBERTS, ASSOCIATES, a Delaware limited partnership,

Plaintiffs,

-against-

BRIGNOLI CURLEY & ROBERTS, ASSOCIATES, a limited partnership, BRIGNOLI & CURLEY INC. and RICHARD BRIGNOLI,

Defendants.

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A non-jury trial was held before the Honorable Milton Pollack on June 12, 27, 28 and 29 and July 10,

1989. Thereafter, the Court handed down its opinion dated August 4, 1989, directing entry of an interlocutory judgment on plaintiffs' claims. In accordance with the terms of said opinion, it is

ORDERED, ADJUDGED and DECREED that:

1. Richard Brignoli shall immediately restore to Brignoli, Curley & Roberts Associates ("BCR") free and clear of any liens, claims or encumbrances, a Certificate of Deposit in the amount of $175,000 plus accrued interest which BCR has at Republic National Bank of New York. If Richard Brignoli fails to do so within three days of the entry of this judgment, then judgment shall be entered in favor of BCR against Richard Brignoli in such amount as is necessary to be paid to Republic National Bank of New York to release the Certificate of Deposit belonging to BCR.

2. BCR shall be dissolved. To the extent BCR has retained any clients, such clients are to be advised that BCR will cease operations as of September 30, 1989.

3. The law firm of Battle Fowler, 280 Park Avenue, New York, New York by Gerald J. Fields, Esq., a member of the firm, shall be appointed as receiver and liquidating trustee for BCR. The Receiver and Liquidating Trustee shall have the power:

a) to retain an accounting firm to prepare schedules showing as of the date of entry of

this judgment (i) all receipts of funds by BCR from December 1, 1987 and the source of each such receipt; (ii) each disbursement of funds by BCR from December 1, 1987, ro such earlier date as the accountants may establish for the disbursements of BCR funds, to be grouped by recipient showing the recipient and the purpose of the disbursement; (iii) all outstanding payables of BCR; (iv) any contingent liabilities of BCR; and (v) the assets, including receivables, of BCR.

b) to determine whether any claims should be prosecuted, or continue to be prosecuted, by BCR including, but not limited to, (i) claims against any partner of BCR or person controlling any partner and (ii) claims against Richard Bennett, Brick Securities LP or Brick Securities Associates. Nothing contained in this Judgment, however, precludes any individual or entity other than BCR from prosecuting at their own expense any claim that they may have.

c) to take any action which could have been taken by general partner of BCR.

4. The Receiver and Liquidating Trustee, and the accounting firm retained by it, shall have their fees paid, subject to the approval of the Court, from the assets

of BCR before any payments are made from those assets to either the creditors or partners of BCR.

5. Richard Brignoli, Brignoli & Curley, Inc. and BCR are each ordered to produce all books, records and files pertaining to the business of BCR at the offices of BCR on the third floor of 15 West 39th Street, New York, New York and deliver possession of such documents, books and records to the Receiver and Liquidating Trustee.

6. The Receiver and Liquidating Trustee shall:

a) immediately take into its custody; control and possession all assets and property of BCR;

b) conserve and liquidate all assets and property of BCR in a manner which the Receiver and Liquidating Trustee finds, in its sole discretion, to be the most advantageous to the estate, and to invest such resulting funds in interest bearing accounts at any bank located in the County of New York organized under the laws of the United States of America, or any state thereof, having a combined capital and surplus of not less than $50,000,000, whose deposits are insured by the Federal Deposit Insurance Corporation; and

c) hold such funds pending final determination of their disposition as may be further ordered by this Court.

7. On or before October 10, 1989, or such later date as the Court may establish, the Receiver and Liquidating Trustee shall:

a) convert all property of BCR to cash; and

b) file with the Court a report stating (i) the cash held in the accounts of BCR and any realizable receivables of BCR; (ii) any accounts payable by BCR; (iii) the recommended disposition of any claims previously asserted by BCR; (iv) a recommendation as to whether BCR should assert claims against any person or entity for injury caused to BCR as a result of the acts of said person or entity; (v) a recommendation of whether plaintiffs in this action should have the legal fees incurred in connection with this action reimbursed from the funds, if any, recovered by BCR from the persons responsible for the breaches of fiduciary duty set forth in the August 4 opinion of the Court and, if such reimbursement is recommended, the amount recommended to be reimbursed.

8. The Receiver and Liquidating Trustee may pursue, within the context of the proceeding for an accounting, any counterclaims asserted in this action against John Curley, James Karanfilian or Duane Roberts to the extent such counterclaims are not precluded by this Judgment or by the judgment in the jury verdict rendered in connection with the claims BCR asserted against Brick Securities and Richard Bennett in an earlier phase of this action.

9. Within two days of the entry of this Judgment, the Receiver and Liquidating Trustee shall send a copy thereof by Certified Mail/Return Receipt Requested to each of the remaining clients of BCR.

Dated: New York, New York
January __, 1991

s/Milton Pollack

Clerk of the Court

TO:

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APPENDIX E

FED. R. CIV. P. 17. Parties Plaintiff and Defendants; Capacity

(a) Real Party In Interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

(b) Capacity to Sue or be Sued. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of the individual's domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has

no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Titled 28, U.S.C. §§ 754 and 959(a).

(c) **Infants or Incompetent Person.** Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may sue by next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

APPENDIX F

FED. R. CIV. P. 19.Joinder of Persons Needed For Just Adjudication

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joiner of that party would render the venue of the action improper, that party shall be dismissed from the action.

(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those

already parties; second, the extend to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of Class Actions. This rule is subject to the provisions of Rule 23.

APPENDIX G

FED. R. CIV. P. 21.Misjoinder and Non-Joinder of Parties

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be served and proceeded with separately.

APPENDIX H

FED. R. CIV. P. 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby

making appropriate final injunctive relief or corresponding declaratory relief with respect tot he class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B)

the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2) whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Action. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceeding or prescribing measures to prevent undue repetition of complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the

action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) **Dismissal or Compromise.** A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

APPENDIX I

FED. R. CIV. P. 23.2 Actions Relating to Unincorporated Associations

An action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties may be maintained only if it appears that the representative parties will fairly and adequately protect the interest of the association and its members. In the conduct of the action the court may make appropriate orders corresponding with those described in Rule 23(d), and the procedure for dismissal or compromise of the action shall correspond with that provided in Rule 23(e).